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REQUESTS FOR ADMISSION IN WISCONSIN PROCEDURE: CIVIL LITIGATION'S DOUBLE-EDGED SWORD

JEFFREY S. KINSLER*

Requests for admission are the most effective, but least utilized, form of discovery.¹ Interrogatories, document production requests and depositions are routinely used in civil litigation, but as few as ten percent of attorneys use requests for admission.² Admissions have the potential to simplify legal and factual issues, expedite civil litigation, and reduce costs for clients, lawyers and taxpayers.³ Requests for admission have proven to be an effective discovery device in many types of civil actions,⁴ and nothing expedites discovery and brings the litigation to a head faster than requests for admission.⁵ Despite such enormous potential, Wisconsin trial lawyers have been extremely hesitant to use requests for admission, as evidenced by the number of reported decisions involving this potent form of discovery.⁶

This Article contains a comprehensive survey designed to educate practitioners, academicians, and students on the law of requests for admission in Wisconsin. The primary goal of this Article is to demonstrate that requests for admission are double-edged swords. On the one hand, they can be used by the requesting party to reduce the time and expense of civil litigation and, in some cases, even to achieve outright victory. On the other hand, the answering party faces virtual ruin if the requests are

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1. Christopher A. Kenney, *Making Requests for Admissions Work*, 38 TRIAL LAW. GUIDE 1, 1 (1994). This comparison, of course, includes only the major forms of discovery—interrogatories, oral depositions, document production requests and requests for admission. It does not include physical and mental examinations or depositions upon written questions.

2. *Id.*

3. Linda M. Atkinson & Mary S. White, *Requests to Admit*, 23 TRIAL 45, 45 (1987).

4. 4A JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 36.02 (2d ed. 1994).

5. Edna S. Epstein, *Rule 36: In Praise of Requests to Admit*, 7 LITIG. 30, 30-31 (1981).

6. Since enactment in 1976, section 804.11 of the Wisconsin Statutes has been mentioned in less than 40 decisions. Less than five of these decisions have been reported in the official reporters; the others are reported only on computer research services, like LEXIS and Westlaw.

not responded to in a proper and timely fashion.⁷ Another goal of this Article is to prove that although the dangers associated with requests for admission are far greater than those of any other discovery device, it is a form of discovery that should be praised, not disparaged.

This Article also has four secondary goals, which hopefully will be achieved as a by-product of its primary goals: (1) a disclosure of the fact that requests for admission are the most underutilized form of discovery; (2) an explanation of why this discovery tool is used so infrequently in civil litigation; (3) a demonstration of the enormous potential of requests for admission in Wisconsin civil litigation; and (4) an illustration of the hazards lawyers face if requests for admission are mishandled, including exposure to sanctions, malpractice liability and, in some instances, professional discipline.

To be used effectively, one must fully understand the substantive and procedural nuances of requests for admission. Consequently, the first part of this Article will examine the history and purposes of requests for admission, the permissible scope of requests for admission, methods of responding to requests for admission, and the effect of an admission. This will include a discussion of the procedural aspects of filing and responding to requests for admission.

I. SECTION 804.11

Section 804.11 of the Wisconsin Statutes governs the discovery procedure known as requests for admission.⁸ Briefly described, a request for admission is a device by which a litigant may request that an adversary admit, for the purposes of the pending action only, the truth of any matters relevant to the action, including statements of fact, opinions of fact, the application of law to fact, or the genuineness of documents.⁹ If the answering party denies the request and the proposition is proved during trial, and if the court in a post-trial hearing finds that the refusal was improper, the costs of proof are imposed on the answering party.¹⁰

A. History

Section 804.11 is patterned on Rule 36 of the Federal Rules of Civil Procedure (FRCP). FRCP 36, in turn, was derived from several sources,

7. Kenney, *supra* note 1, at 17.

8. WIS. STAT. § 804.11 (1993-94).

9. *Id.* § 804.11(1)(a).

10. Ted Finman, *The Request for Admissions in Federal Civil Procedure*, 71 YALE L.J. 371, 372 (1962).

including former Equity Rule 58,¹¹ the English Rules Under the Adjudicature Act,¹² and several state statutes.¹³ One of the state statutes from which FRCP 36 was derived was former section 327.22 of the Wisconsin Statutes, which was substantively identical to the current version of FRCP 36.¹⁴

As originally enacted, FRCP 36 was much broader in scope than its predecessors. Former Equity Rule 58 merely imposed liability for the costs of proving documents about which requested admissions had been withheld.¹⁵ FRCP 36, on the other hand, applied not only to documents but to statements set forth in the requests.¹⁶ Requests for admission were not limited to the genuineness of documents or the truth of facts set forth in the documents but could require the admission or denial of

11. Former Equity Rule 58 provided:

By a demand served ten days before the trial, either party may call on the other to admit in writing the execution or genuineness of any document, letter or other writing, saving all just exceptions; and if such admission be not made within five days after such service, the costs of proving the document, letter or writing shall be paid by the party refusing or neglecting to make such admission, unless at the trial court shall find that the refusal or neglect was reasonable.

BYRON F. BABBITT, *FEDERAL JUDICIAL CODE AND EQUITY RULES* 294 (1925).

12. *FED. R. CIV. P.* 36 advisory committee note (1937).

13. CHARLES A. WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 2251, at 519 (2d ed. 1994).

14. *WIS. STAT.* § 327.22 (1935) provided:

(1) Any party to any action may, by notice in writing served upon a party or his attorney not later than ten days before the trial, call upon such other party to admit or refuse to admit in writing:

(a) The existence, due execution, correctness, validity, signing, sending or receiving of any document, or

(b) The existence of any specific fact or facts material in the action and stated in the notice.

(2) Such admission if made shall be taken as conclusive evidence against the party making it, but only for that particular action and in favor of the party giving the notice; it shall not be used against him in any other action or proceeding or on any other occasion, and shall not be received in evidence in any other action or trial.

(3) If the party receiving such notice fails to comply therewith within five days after such service the facts therein stated shall be taken to be admitted.

(4) In case of refusal to make such admission, the reasonable expense of proving any fact or document mentioned in the notice and not so admitted shall be determined by the court at the trial and taxed as costs in any event against the party so notified, unless the court is satisfied the refusal was reasonable.

(5) The court may allow the party making any such admission to withdraw or amend it upon such terms as may be just, and may, for good cause shown, relieve a party from the consequences of a default.

15. WRIGHT & MILLER, *supra* note 13, § 2251, at 520-21.

16. *Id.* at 519.

any relevant matters of fact set forth in the request.¹⁷ Despite the inclusive language of the new FRCP 36, some courts still considered it limited to document authentication.¹⁸ In an effort to reemphasize its broad scope, FRCP 36 was amended in 1946 to remove any uncertainty as to whether a party could be called upon to admit statements of fact other than those set forth in relevant documents.¹⁹ After the 1946 amendment, it was clear that all relevant factual statements were subject to requests for admission.

FRCP 36 was substantially overhauled again in 1970. Before that year, courts had disagreed about the proper scope of requests for admission.²⁰ Many courts had held that FRCP 36 was limited to admissions of "facts." Requests seeking opinions or disputable matters were considered objectionable.²¹ The 1970 amendment made clear that FRCP 36 encompassed both opinions and disputable matters. In addition, the 1970 amendment described the answering party's duty when a request sought information unknown to the answering party, and also reemphasized the binding effect of admissions.²² Procedurally, the 1970 amendment brought requests for admission into line with other federal discovery provisions.²³

In 1976, Wisconsin adopted the language of FRCP 36.²⁴ The new statute, section 804.11,²⁵ differed from the former rule in Wisconsin in

17. *Id.* at 520.

18. *See id.*

19. FED. R. CIV. P. 36 advisory committee note (1946). The change confirmed an earlier decision in which a party was permitted to request admission of facts not contained in relevant documents. *See Smyth v. Kaufman*, 114 F.2d 40, 42 (2d Cir. 1940).

20. WRIGHT & MILLER, *supra* note 13, § 2251, at 520.

21. *Id.* at 520-21.

22. *Id.*

23. FED. R. CIV. P. 36 advisory committee note (1970) [hereinafter 1970 Note]. FRCP 36 was amended again in 1987 to make its language gender-neutral. *See* FED. R. CIV. P. 36 advisory committee note (1987). In 1993, FRCP 36 was again amended so as to conform to FRCP 26(f), which prevents a party from seeking formal discovery until after a meeting of the parties. FED. R. CIV. P. 36 advisory committee note (1993).

24. *Schmid v. Olsen*, 111 Wis. 2d 228, 236, 330 N.W.2d 547, 551 (1983).

25. Section 804.11 of the Wisconsin Statutes provides, in pertinent part:

(1) REQUEST FOR ADMISSION. (a) A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of [sec.] 804.01(2) set forth in the request that relate to statements or opinions of fact or the application of law to fact, including the genuineness of any documents described in the request. Copies of documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party.

three respects.²⁶ First, section 804.11 expressly provides a procedure for objection for the party served with the requests for admission. Second, under section 804.11 the request need not be limited to facts, but may seek, when appropriate, opinions of facts or the application of law to fact. Third, section 804.11 is not limited to facts "material to the action" but rather is tied into the broad relevancy rule of section 804.01(2).²⁷

B. Federal Authority

Section 804.11 is based on FRCP 36. Since its enactment in 1976, there have been less than forty Wisconsin decisions interpreting section 804.11. Consequently, Wisconsin courts have looked to federal case law for guidance. Federal decisions construing procedural counterparts to the Wisconsin Rules of Civil Procedure are persuasive authority, but are not controlling.²⁸ The Supreme Court of Wisconsin has implicitly approved the use of federal case law to construe section 804.11.²⁹ More-

(b) Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within 30 days after service of the request, or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or attorney, but, unless the court shortens the time, a defendant shall not be required to serve answers or objections before the expiration of 45 days after service of the summons and complaint upon the defendant. If objection is made, the reasons therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify an answer or deny only a part of the matter of which an admission is requested, the party shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless the party states that he or she had made reasonable inquiry and that the information known or readily obtainable by the party is insufficient to enable the party to admit or deny. A party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request; the party may, subject to [sec.] 804.12(3) deny the matter or set forth reasons why the party cannot admit or deny it.

See WIS. STAT. §§ 804.11(1)(c), 804.11(2) (1993-94).

26. WIS. STAT. § 804.11 Judicial Council Committee notes (1974).

27. WIS. STAT. § 804.01(2) (1993-94), which is patterned on FRCP 26, provides:

Unless otherwise limited by order of the court in accordance with the provisions of this chapter, the scope of discovery is as follows . . . Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party . . .

28. *Wilson v. Continental Ins. Co.*, 87 Wis. 2d 310, 316, 274 N.W.2d 679, 682 (1979).

29. *Bank of Two Rivers v. Zimmer*, 112 Wis. 2d 624, 630-31, 334 N.W.2d 230, 233 (1983); see also ROBERT B. CORRIS & MARK M. LEITNER, WISCONSIN DISCOVERY LAW AND PRACTICE § 5.1 (1994).

over, the court of appeals has recognized the instructive value of federal authority construing FRCP 36.³⁰ Accordingly, after considering the Wisconsin case law construing section 804.11, those seeking guidance on specific issues relating to requests for admission should consult federal cases interpreting FRCP 36.

C. Utilization

Of all the major discovery devices—interrogatories, document production requests, depositions and requests for admissions—requests for admission are the least utilized.³¹ This is true despite the fact that requests for admission have been praised by practitioners and academicians alike.³² In cases where discovery is used,³³ requests for admission comprise only 5.6% of all discovery requests filed, compared to oral deposition notices and interrogatories, which comprise 43.1% and 35.4%, respectively, of all discovery requests.³⁴ In the average case, 3.2 oral deposition notices and 2.28 sets of interrogatories are served, while a set of requests for admission is served in only one out of three cases.³⁵ Requests for admission are perhaps the most underestimated and underutilized trial preparation tool available to lawyers.³⁶

The underutilization appears to stem from frustration experienced by attorneys in obtaining meaningful responses to the requests they submit.³⁷ According to a recent survey of trial lawyers:

The great majority of respondents to the questionnaire expressed frustration in obtaining substantive concessions through the use of requests for admission. Several stated that as to any important matters, the request procedure degenerated into a semantic battle. As a result, most viewed the usefulness of the procedure largely in the authentication of documents and in clearing away evidentiary objections—such as objections to the foundation re-

30. *Michael A.P. v. Solsrud*, 178 Wis. 2d 137, 148, 502 N.W.2d 918, 922 (Ct. App. 1993), review denied, 508 N.W.2d 422 (Wis. 1993).

31. *Report on Practice Under Rule 36: Requests for Admission*, 53 ALB. L. REV. 33, 33 (1988); David L. Shapiro, *Some Problems of Discovery in an Adversary System*, 63 MINN. L. REV. 1055, 1078 (1979).

32. *Report on Practice Under Rule 36*, *supra* note 31, at 33-34; see also Thomas W. Evans, *Admissions Practice*, 62 ST. JOHN'S L. REV. 475, 475 (1988).

33. PAUL R. CONNOLLY ET AL., *JUDICIAL CONTROLS AND THE CIVIL LITIGATIVE PROCESS: DISCOVERY* 30-31 (1978).

34. *Id.*

35. *Id.* at 32.

36. Kenney, *supra* note 1, at 1.

37. *Report on Practice Under Rule 36*, *supra* note 31, at 34.

quirements for the business records exception to the hearsay rule.³⁸

The lack of use can also be traced to the general reluctance of courts to grant sanctions and the difficulty for courts to deal effectively with the denial of requests for admission prior to trial.³⁹ Whatever the cause of the underutilization, most lawyers agree that the active involvement of the court at early stages of the litigation will solve many of the problems associated with requests for admission.⁴⁰

Other commentators have suggested that the vagueness of FRCP 36 has led to the lack of use, and in some cases, the misuse of requests for admission.⁴¹ Another reason suggested for its underuse derives from a basic misconception by some lawyers that a request for admission is not a genuine discovery procedure in that it presupposes that the litigant using it already knows the facts or has the document and merely wishes his or her opponent to concede their genuineness.⁴² Another commentator, Professor David L. Shapiro of the Harvard Law School, believes that "[i]f there is an explanation for the failure of litigants to make more frequent use of this valuable device, perhaps it lies in the inconsistency between a rule compelling an adversary to stipulate to certain propositions and some of the tenets of the adversary system."⁴³ Many lawyers and parties simply believe a discovery device premised on receiving straightforward, truthful, yes-or-no answers from an adversary is doomed to failure.⁴⁴

The author of this article, on the other hand, posits that the most likely reason lawyers shy away from using requests for admission is the lack of understanding of this potent discovery device in the legal community. The goal of this article is to provide the knowledge necessary for Wisconsin lawyers to make effective use of requests for admission.

38. *Id.* at 42.

39. *Id.* According to a survey of New York attorneys, most found that the procedure for obtaining sanctions was not cost-efficient. *Id.*

40. *See id.* at 43.

41. *See* Helen H. Cutner, *Discovery—Civil Litigation's Fading Light: A Lawyer Looks at the Federal Discovery Rules After Forty Years of Use*, 52 TEMP. L.Q. 933, 981 (1979).

42. *Report on Practice Under Rule 36*, *supra* note 31, at 35.

43. Shapiro, *supra* note 31, at 1079.

44. ROGER S. HAYDOCK ET AL., *FUNDAMENTALS OF PRETRIAL LITIGATION* § 9.1, at 425 (3d ed. 1994).

II. PURPOSE OF REQUESTS FOR ADMISSION

Requests for admission are one of several forms of written discovery available to Wisconsin trial lawyers. Unlike other discovery devices, requests for admission are not designed to discover facts. Because of the form in which requests for admission are submitted, it is assumed that the requesting party knows the facts before asking an adverse party to admit that the statement is true. Requests for admission ask the answering party to "admit that so-and-so" is true. Consequently, admissions are not designed, for example, to discover the names of potential witnesses, as one cannot ask an adversary to admit that some particular person was a witness until that person's name is known to the requesting party.⁴⁵

Requests for admission serve two vital purposes. Admissions are sought, first, to facilitate proof with respect to issues that cannot be eliminated from the case, and secondly, to narrow the issues by eliminating those that can be.⁴⁶ Thus, requests for admission can be used to define the issues involved in the case and to resolve some or all of the conflicts prior to trial:

[A]dmissions promote both efficiency and economy in resolving disputes. If a point is conceded, litigants need not expend effort in investigations concerning it nor incur expense in presenting evidence to prove it. Judicial administration is also aided. Admissions reduce the time required to try a case. Indeed, they often make summary judgment possible. Finally, admissions encourage litigants to evaluate realistically the hazards of trial and thus tend to promote settlements.⁴⁷

Requests for admission define and limit the controversy between parties to a lawsuit, freeing the court and the parties to concentrate on matters at the heart of the dispute.⁴⁸ In some cases, admissions may dispose of the entire case.⁴⁹

45. Atkinson & White, *supra* note 3, at 45.

46. 1970 Note, *supra* note 23.

47. Finman, *supra* note 10, at 376. According to Professor Finman, discovery serves three functions: defining the controversy; resolving some or all of the conflicts before trial; and uncovering factual material for use in preparing for trial. Requests for admission can assist in the first two functions, but not the last one, because requests, by their very nature, are not designed to uncover facts. *Id.* at 373.

48. JAY E. GRENIG & WALTER L. HARVEY, 3 WISCONSIN PRACTICE § 411.1, at 565 (2d ed. 1994).

49. *Id.*

No suit can be tried without some definition of its factual and legal boundaries. A definition of the controversy is essential.⁵⁰ Admissions facilitate the defining of a controversy by eliminating issues from the case that are not in controversy and by narrowing those issues that are in controversy. For example, although the parties may disagree about the meaning of a document, requests can be used to establish a foundation for the document to be admitted at trial.⁵¹ Admissions enable a party to pin an adversary to a certain position.⁵²

A controversy should be limited as well as defined.⁵³ Contentions not subject to good faith dispute should be resolved through concession rather than by submission to a judge or jury.⁵⁴ When a contention cannot be honestly and reasonably disputed, the adversarial approach delays and even endangers a just resolution of the issues.⁵⁵ Limiting the controversy promotes efficiency and economy in civil litigation, resulting in lower costs for clients and lawyers.

Considering the issue-foreclosing nature of requests for admission, they can also play a vital role in settlement:

Unlike other forms of evidence which you may rely on in discussing settlement, an admission cannot be the subject of disputed veracity or credibility. You may tell opposing counsel during a settlement negotiation that the evidence you have obtained by way of interrogatory answers, deposition testimony, or witness statements clearly supports you on a particular issue vital to the case. You can expect that the opposing counsel will dispute your characterization of the evidence, and the negotiation value of the evidence you cite will be minimized. Where, however, the evidence you rely upon to support your position in a settlement negotiation is an admission to a request to admit, opposing counsel is unable to assail the truth, veracity or credibility of the evidence. The admission is indisputable, and your adversary knows that. Therefore, you can use admissions on vital issues effectively during settlement negotiations in an attempt to resolve a dispute quickly and in your client's best interests.⁵⁶

50. Finman, *supra* note 10, at 375.

51. CORRIS & LEITNER, *supra* note 29, § 5.3.

52. *Id.*

53. Finman, *supra* note 10, at 376.

54. *Id.*

55. *Id.*

56. LARRY S. KAPLAN, *COMPLEX FEDERAL LITIGATION* § 17.23, at 389-90 (1993).

Strategically, the requesting party's attorney must decide whether a particular admission justifies the initiation of settlement discussions.⁵⁷ If the requesting party decides to pursue settlement, the admissions will give him or her the upper-hand in negotiations. The requesting party should be sensitive to the point in time in the litigation process at which to broach settlement. The answering party may be the most vulnerable to settling the case in a way that maximizes the requesting party's interests soon after the answering party has been forced to admit a vital fact.⁵⁸ The longer the requesting party waits, the less impact the admission may have.

A. *Discovery or Pleadings?*

It has been suggested that requests for admission are not true discovery procedures.⁵⁹ The rationale for this position is that the party seeking the admission already knows the facts or has the documents and merely seeks an admission that will establish the facts or authenticate the documents.⁶⁰ It has been argued that requests for admission should be called "requests for stipulations," since the term admission suggests that evidence is being sought by the device.⁶¹ The misconception regarding the role of admissions is due to the fact that requests for admission, historically, were limited only to document authentication, and could not be used for traditional discovery purposes. FRCP 36 was amended in 1946, and again in 1970, to clarify that requests could be used to obtain admissions on any fact relevant to the litigation, not just facts contained in documents.

One commentator has placed part of the blame for the continuation of this misconception on West Publishing Company.⁶² In an effort to illustrate the broad scope of FRCP 36, its title was changed in 1970 from "Admission of Facts and of Genuineness of Documents" to "Requests for Admission." Despite the name change, West Publishing continued to use the old title for FRCP 36 until 1980.⁶³ This misnomer, in part, prolonged the confusion over whether admissions are a discovery device.⁶⁴

57. *Id.* at 390.

58. *Id.*

59. WRIGHT & MILLER, *supra* note 13, § 2253, at 524; *see also* Schmid v. Olsen, 111 Wis. 2d 228, 240 n.1, 330 N.W.2d 547, 553 n.1 (1983) (Steinmetz, J., dissenting).

60. WRIGHT & MILLER, *supra* note 13, § 2253.

61. 1 SHEPARD'S DISCOVERY PROCEEDINGS IN FEDERAL COURT 499 (2d ed. 1991).

62. Evans, *supra* note 32, at 478.

63. *Id.*

64. *See id.*

There seems little doubt that admissions are part of the discovery process. Not only is section 804.11 contained in the "Depositions and Discovery" section of the Wisconsin Statutes,⁶⁵ but most commentators now agree that admissions are true discovery devices.⁶⁶ Discovery serves three purposes: (1) defining the controversy; (2) resolving some or all of the conflicts before trial; and (3) uncovering factual material for use in preparing for trial. While admissions are not suited to serve the third function, they are perfectly designed to further the first and second functions of discovery.⁶⁷ Those commentators who consider admissions outside the realm of discovery view discovery practice too narrowly.

B. Practical Use of Admissions

As one commentator aptly stated, "requests for admission should be used early, often and precisely."⁶⁸ Requests for admission have been used in all types of civil litigation in Wisconsin, ranging from forfeiture actions⁶⁹ to prisoner's rights litigation.⁷⁰ Skillful application of requests for admission to all phases of case preparation and trial focuses the evidence on the pertinent issues.⁷¹

1. Procedure

Requests for admission may be served on any other party without leave of the court.⁷² Requests can be served at anytime after the commencement of the litigation. Ordinarily, responses to requests for admission must be served within thirty days after service of the requests.⁷³ The thirty-day period begins to run when the requesting party mails the requests.⁷⁴ If the requesting party submits a properly executed affidavit

65. *But see* *Hurt v. Coyne Cylinder Co.*, 124 F.R.D. 614, 615 (W.D. Tenn. 1989) (fact that Rule 36 is contained in discovery section of Federal Rules of Civil Procedure does not, by itself, establish that a request for admission is a discovery device).

66. *See, e.g.*, *CORRIS & LEITNER*, *supra* note 29, § 5.1; *Evans*, *supra* note 32, at 478-79.

67. *Finman*, *supra* note 10, at 373.

68. *Atkinson & White*, *supra* note 3, at 54.

69. *See* *State v. Gaynor*, No. 83-283, (Wis. Ct. App. Aug. 26, 1983) (LEXIS, States library, Wisc file) (limited precedent opinion).

70. *See* *Richards v. Kolb*, No. 88-0344, 1988 Wisc. App. LEXIS 851, at *1-2 (Ct. App. Sept. 29, 1988) (limited precedent opinion).

71. *See id.* at *1-6.

72. A copy of the request should be served on all other parties to the action. *GRENIG & HARVEY*, *supra* note 48, § 411.2, at 566.

73. WIS. STAT. § 804.11(1)(b) (1993-94). Unless the court orders otherwise, the original copy of the requests for admission should be kept by the requesting party. WIS. STAT. § 804.01(6) (1993-94).

74. *E.E.O.C. v. Jordan Graphics, Inc.*, 135 F.R.D. 126, 127-28 (W.D.N.C. 1991).

or certificate of service demonstrating that the requests were properly served, the burden of proving improper service shifts to the answering party. Denying receipt, alone, is insufficient to overcome the presumption of service.⁷⁵

There are two exceptions to the thirty-day rule. First, if requests for admission are served with the summons and complaint, the defendant is given forty five days to respond.⁷⁶ Second, the trial court has discretion to shorten or lengthen the response time in the interests of justice.⁷⁷ On the other end of the spectrum, requests for admission may not be served after the discovery cut-off date, though there is some contrary authority.⁷⁸

Many jurisdictions limit the number of interrogatories a party may serve on an adversary.⁷⁹ No similar limits are placed on requests for admission. While courts have inherent discretion to limit the number of requests, they have approved requests containing 704 admissions,⁸⁰ 244 admissions,⁸¹ and 106 admissions,⁸² but one court recently struck a request containing more than 2000 admissions.⁸³ One method of preempting a claim that the requests are so numerous as to be burdensome is to divide the requests into smaller sets and serve these sets in reasonably timed waves.⁸⁴

75. *Unger v. Basterash*, No. 89-1055, 1990 Wisc. App. LEXIS 312, at *2 (Ct. App. Apr. 10, 1990) (limited precedent opinion).

76. WIS. STAT. § 804.11(1)(b) (1993-94).

77. *Id.*

78. *Hurt v. Coyne Cylinder Co.*, 124 F.R.D. 614, 615 (W.D. Tenn. 1989). The *Hurt* court held:

When the intended functional purpose of Rule 36 is considered, the fact that the rule on requests for admissions is included in the discovery section of the Federal Rules of Civil Procedure seems little reason to cut off the reasonable utilization of requests for admissions before trial as is usually done with discovery. This court concludes that [a] Rule 36 request for admissions is not included within the parameters of a general cutoff for discovery in a scheduling order.

Id.

79. For example, Local Rule 7.03 of the U.S. District Court for the Eastern District of Wisconsin limits parties to 15 interrogatories unless prior court approval is obtained. E.D. Wis. R. 7.03.

80. *Photon, Inc. v. Harris Intertype, Inc.*, 28 F.R.D. 327, 328 (D. Mass. 1961).

81. *Berry v. Federated Mut. Ins. Co.*, 110 F.R.D. 441, 442-43 (N.D. Ind. 1986).

82. *Shawmut, Inc. v. American Viscose Corp.*, 12 F.R.D. 488, 489 (D. Mass. 1952).

83. *Misco, Inc. v. United States Steel Corp.*, 784 F.2d 198, 206 (6th Cir. 1986).

84. *CORRIS & LEITNER*, *supra* note 29, § 5.15. More important, if the drafter specifically and unequivocally identifies each matter upon which admission is requested, the answering party will be hard pressed to argue that such requests, although numerous, constitute an undue or oppressive burden. *Id.*

There is no limit on the number of times a party may serve requests for admission on an adversary.⁸⁵ The rules recognize the value of multiple requests for admission.⁸⁶ A party may, and should, serve multiple requests for admission as he or she learns more about the case.⁸⁷ Some attorneys serve a first set of requests with the initial pleading,⁸⁸ a second set to follow up interrogatories, a third set to pin down deponents, and a final set shortly before the pretrial conference to narrow the issues for trial.⁸⁹ Courts have held that successive sets of requests are not burdensome or oppressive in complex litigation.⁹⁰

In simpler cases, economics often dictate the discovery process, limiting most cases to only one set of requests for admission.⁹¹ In such cases, requests for admission must fit within the party's overall litigation plan. In smaller cases, Professor Thomas Mauet suggests using the "building block" approach to discovery.⁹² This approach starts with the serving of interrogatories, which are designed to obtain basic information, such as the names and addresses of witnesses and the identity and location of

85. JOHN H. YOUNG & TERRI A. ZALL, *MASTERING WRITTEN DISCOVERY* § 7.26 (2d ed. 1994). One of the faults with admissions in complex cases, according to one author, is that they are usually propounded too early in the case and are so broadly drafted as to invite artful denial. Admissions should be filed only after considerable thought and should be addressed to the facts of which each party has personal knowledge or that can be established clearly by the testimony of others. *Id.*

86. Epstein, *supra* note 5, at 30.

87. *Id.*

88. Mark A. Dombroff, *Requests for Admissions: Weighing the Pros and Cons*, 19 TRIAL 82, 85 (1983). An effective tactic is to file a set of requests for admission with the complaint. The requesting party will have a substantial amount of investigative material prior to the filing of the complaint. This material, coupled with client consultations, can provide enough information to formulate requests at an early stage. The advantage of this approach is that it may eliminate a great deal of costly discovery and has the potential for securing damaging admissions from the answering party before he or she has had a chance to formulate a case strategy. *Id.*

89. *See id.* at 82, 85. The first set of requests should be sent out before the opponent's deposition, so that the opponent's deposition testimony will be restricted to the admissions made in response to the first request. A second set should be sent out following all depositions and other written discovery to clear up any ambiguities, and possibly to prepare for summary judgment. A final set should be sent out just before trial to confirm the propounding party's trial strategy. *See id.*

90. *United States v. Watchmakers of Switz. Info. Ctr., Inc.*, 25 F.R.D. 346, 347 (S.D.N.Y. 1960).

91. One tactic a lawyer should carefully watch out for, no matter which side of the case he or she is on, is the filing of requests for admissions with the initial pleadings. It is easy for the attorney to overlook these early requests, resulting in a late filing. In such circumstances, the requesting party will claim that, because there was a great deal of discovery yet to come, he or she has relied on the deemed admission to the requesting party's prejudice. MARK A. DOMBROFF, *DISCOVERY* § 6.14, at 275 (1986).

92. THOMAS A. MAUET, *PRETRIAL* 176 (2d ed. 1993).

documents and other tangible evidence. In some instances, contention interrogatories may also be used to discover an adversary's position on disputed facts.

Once the answer to the interrogatories is received, requests to produce documents should be served on all parties. The requests to produce should seek all relevant documents, records, photographs and other tangible evidence, including any such evidence identified in the answer to the interrogatories. The requesting party may also demand access to an adversary's land to inspect, analyze, or photograph things on it.⁹³ This would also be the time to serve document subpoenas on non-parties.

After the requested documents and other tangible items are received, depositions should be taken of the opposing party and all essential witnesses. Depositions are designed to obtain detailed information from parties and non-parties, and to tie down each of them to a particular account of the relevant events.⁹⁴ Depositions are also useful for obtaining admissions and other impeachment material. In cases where a party's physical or mental condition is at issue, a physical or mental examination of the party may be warranted at this point in the discovery process.⁹⁵ In such cases, the requesting party must seek an order from the court requiring an adversary to appear for examination.⁹⁶

After all other discovery has been completed, requests for admission should be served on the answering party. The conventional wisdom on requests for admission is to use them near the end of discovery to doublecheck the completeness of your factual investigation.⁹⁷ The requests for admission are designed to streamline the issues for trial and to pin down the answering party on positions he or she took during deposition or in answers to interrogatories. The requests are also designed to establish foundational facts for the admission of documents and other tangible evidence. According to Professor Mauet, requests for admission are formidable weapons in small and moderate cases.⁹⁸

93. *Id.* at 171.

94. *Id.*

95. *Id.* In cases likely to settle before trial, Professor Mauet suggests waiting to demand a physical or mental examination until trial is imminent. This approach has the potential to avoid unnecessary expense. *Id.* at 173.

96. *See* WIS. STAT. § 804.10 (1993-94).

97. THEODORE Y. BLUMOFF ET AL., PRETRIAL DISCOVERY § 10.1, at 349 (1993).

98. *See* MAUET, *supra* note 92, at 235.

2. Form of Requests

Each matter of which an admission is requested must be separately set forth in short, numbered paragraphs.⁹⁹ Requests should be simple and direct statements containing a single proposition.¹⁰⁰ When requests for admission are drafted in simple and precise terms, they go far toward eliminating wasted time and expense in litigation.¹⁰¹ If each request contains one simple factual statement, the respondent will be forced to make an unequivocal admission or denial. Requests should be written in plain English, not legalese. For example, a simple, concise request should read: "Defendant Robert Smith is a resident of the State of Wisconsin."¹⁰² Indeed, one court has held that: "A request for an admission, except in a most unusual circumstance, should be such that it could be answered yes, no, the answerer does not know, or a very simple direct explanation given as to why he cannot answer, such as in the case of privilege."¹⁰³

An effective drafting technique that can make evasion of the request more difficult is to follow each request for admission with an interrogatory that states, "If you deny this request, set forth each fact upon which you base your denial."¹⁰⁴ Because answering this type of interro-

99. WIS. STAT. § 804.11(1)(b) (1993-94).

100. All litigants, including pro se parties, must comply with the procedures set forth in section 804.11. See *Hudec Law Office v. Skowronski*, No. 93-2649, 1994 Wisc. App. LEXIS 1094, at *3-4 (Ct. App. Sep. 7, 1994) (limited precedent opinion).

101. Kenney, *supra* note 1, at 4.

102. For examples of well drafted requests for admission, see *CORRIS & LEITNER, supra* note 29, § 5.26.

103. *Johnstone v. Cronlund*, 25 F.R.D. 42, 46 (E.D. Pa. 1960).

104. *Dombroff, supra* note 88, at 83. The following type of interrogatory is effective for accomplishing this purpose:

If your response to any request for admission is other than an unqualified admission, state for each such request for admission the following:

(1) All facts (not opinions) that you contend support in any manner your refusal to admit or your admission.

(2) Identify all documents, notes, reports, memorandums, electronic and/or tape recordings, photographs, oral statements, or any other tangible or intangible thing that supports in any manner your refusal to admit or your qualification of your admission. Identification is to be sufficient to identify the aforesaid things in a request for production.

(3) The name and address of a custodian of all tangible or intangible things identified in response to (2) above.

(4) The name and address of all persons, including consultants, purporting to have any knowledge or factual data upon which you base your refusal to admit or the qualification of your admission.

Id.

gatory is more burdensome than simply admitting the request, it often eliminates frivolous denials.¹⁰⁵

Except when authentication of documents is sought, requests for admission should not incorporate outside material, such as pleadings, motions, or deposition transcripts. Incorporation by reference is improper because it unjustly casts upon the answering party the burden of determining at its peril what portions of the incorporated material contain relevant matters of fact that must be either admitted or denied.¹⁰⁶ Facts admitted in response to a request for admission should be ascertainable merely by examination of the request and of the answer.¹⁰⁷ The requests for admission and the answers should be in such a form so as to be read to the jury, without reference to extraneous materials. Incorporation by reference also gives the answering party too much room to evade the admission. In complex cases, drafting attorneys should also consider defining terms that will be used in more than one request.¹⁰⁸ An instruction section may also be appropriate in complicated cases.¹⁰⁹

C. *Authentication of Documents*

Requests for admission may expedite the trial process by establishing evidentiary foundations that would otherwise consume considerable trial time.¹¹⁰ Using admissions for this purpose is common practice in Wisconsin.¹¹¹ It is not enough to ask the answering party to admit that a document is genuine; rather, the requesting party must ensure that all foundational questions are included in the requests for admission.¹¹² If a request asks the respondent to admit the genuineness of a document, the document should be attached to the request and incorporated by reference therein.¹¹³ For example, requests for admission, if used properly, can avoid lengthy foundation testimony:

105. *Id.*

106. WRIGHT & MILLER, *supra* note 13, § 2258, at 548 n.14.

107. *Id.* § 2258.

108. The use of definition sections in requests for admission has been approved by the Supreme Court of Wisconsin. See Michael A.P. v. Solsrud, 178 Wis. 2d 137, 502 N.W.2d 918 (1993), *review denied*, 179 Wis. 2d clxxxvii, 508 N.W.2d 422 (1993).

109. BLUMOFF ET AL., *supra* note 97, § 10.7.

110. CORRIS & LEITNER, *supra* note 29, § 5.6.

111. See, e.g., First Wis. Nat'l Bank of Milw. v. Spears, No. 79-1693 (Wis. Ct. App. Aug. 13, 1980) (LEXIS, States library, Wisc file) (limited precedent opinion) (plaintiff was forewarned of potential problem with exhibit because defendant denied its authenticity in a request for admission); Roberts v. Thompson, No. 78-231 (Wis. Ct. App. Apr. 18, 1979) (limited precedent opinion) (exhibits authenticated by requests for admission).

112. CORRIS & LEITNER, *supra* note 29, § 5.6.

113. WIS. STAT. § 804.11(1)(a) (1993-94).

[W]hen a party seeks to introduce business records under the hearsay exception of sec. 908.03(6), Stats., the party would normally be required to call a foundation witness who could testify that the record was made at or about the time of the events reflected, that it was found where such records are normally kept, that the record was kept in the ordinary course of business, and that it was the organization's regular practice to make and keep records like the exhibit sought to be introduced.¹¹⁴

The proper foundation for such documents can be established well in advance of trial, saving both time and money.¹¹⁵ In addition, a request may ask the answering party to admit the genuineness of documents belonging to someone other than the answering party, as long as the answering party has reasonable access to such documents.¹¹⁶ Requests for admission can also be used to authenticate photographs.¹¹⁷

Section 804.11 does not require that the document be attached to a request for admission. Rather it provides that "[c]opies of documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying."¹¹⁸ If a document has already been identified in discovery, such as an exhibit in a prior deposition, it need not be attached to the requests for admission, so long as there is no question about the document to which the requesting party is referring.¹¹⁹

D. Disadvantages

Unlike other forms of discovery, there are few disadvantages to using requests for admission. Answers to requests are only binding on the party who made them. Neither the requests nor the answers are binding on the party who propounded the requests for admission. A litigant does not bind himself to the truth of an admission by another party by submitting the request for admission.¹²⁰ The requesting party may disre-

114. CORRIS & LEITNER, *supra* note 29, § 5.6.

115. *Id.*

116. *Id.*

117. SHEPARD'S, *supra* note 61, § 9.4.

118. WIS. STAT. § 804.11(1)(a).

119. Kenney, *supra* note 2, at 8. For example, "The plaintiff admits that the Lease Agreement marked as Exhibit A to the plaintiff's deposition is a genuine copy of the lease agreement in effect between the plaintiff and the defendant from January 1, 1990 to January 1, 1991, for Apartment 3 at 100 Main Street in Boston, Massachusetts."

120. Hajek v. Kappas, No. 91-2221, 1992 Wisc. App. LEXIS 302, at *3 (Ct. App. Mar. 17, 1992) (limited precedent opinion).

gard an answer, even though he or she chooses to offer other answers from the same request into evidence.¹²¹

There are, however, some minor disadvantages in propounding requests for admission. First, if requests are drawn too narrowly, they may reveal the drafting attorney's trial strategy. Second, unless drafted carefully and precisely, a denial will probably be upheld by the court, resulting in wasted time and money.¹²² The ease with which answering parties effectively dodge requests for admission may be the greatest disadvantage.¹²³ Often the answering party will respond to a request by stating that further discovery and investigation is necessary before he or she can give an intelligent response.¹²⁴ In all likelihood, this response will be acceptable to the courts, especially early in the litigation. Another disadvantage of utilizing requests for admission is that the process of drafting requests may take substantially more time than the process of answering them.¹²⁵ This is particularly true if the answering party can simply deny the requests. Unfortunately, courts have been reluctant to intervene in such disputes.

III. SCOPE OF REQUESTS FOR ADMISSION

According to section 804.11, a party may serve upon an adversary a written request for admission of the truth of any matters within the scope of section 804.01(2). Section 804.01(2), which is patterned on FRCP 26(b), provides:

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.¹²⁶

Essentially, section 804.11 entitles a party to require any other party to admit or deny the truthfulness of opinions or facts; the application of law

121. *Id.*

122. Dombroff, *supra* note 88, at 83.

123. DOMBROFF, *supra* note 91, § 6.03.

124. *Id.*

125. *Id.*

126. WIS. STAT. § 804.01(2)(a) (1993-94).

to fact; or the genuineness of documents.¹²⁷ The Federal Advisory Committee explained the scope of FRCP 36 as follows:

[Rule 36(a)] provides that a request may be made to admit any matters within the scope of Rule 26(b) that relate to statements or opinions of fact or of the application of law to fact. It thereby eliminates the requirement that the matter be "of fact." This change resolves conflicts in the court decisions as to whether a request to admit matters of "opinion" and matters involving "mixed law and fact" is proper under the rule Not only is it difficult as a practical matter to separate "fact" from "opinion," . . . but an admission on a matter of opinion may facilitate proof or narrow the issues or both. An admission of a matter involving the application of law to fact may, in a given case, even more clearly narrow the issues. For example, an admission that an employee acted in the scope of his employment may remove a major issue from the trial.¹²⁸

In other words, requests can cover almost any issue, simple or complex,¹²⁹ except pure questions of law.¹³⁰ There are, however, some issues with which the courts continue to grapple.

A. *Opinions*

Prior to the 1970 amendments to FRCP 36, a majority of decisions held that only matters of "fact" were properly the subject of requests for admission.¹³¹ They sustained objections to requests that asked for opinions or conclusions.¹³² In 1970, FRCP 36 was amended to provide that requests could seek opinions and conclusions. However, requests involving the application of law to fact may, in some instances, be more appropriate after discovery has been completed.¹³³ Accordingly, a change was made to FRCP 36 that allows the court to postpone final disposition of a request until a pretrial conference has been held.¹³⁴

127. See Patricia Graczyk, *The New Wisconsin Rules of Civil Procedure: Chapter 804*, 59 MARQ. L. REV. 463, 520 (1976).

128. 1970 Note, *supra* note 23, at 567-68.

129. Epstein, *supra* note 5, at 30.

130. GRENIG & HARVEY, *supra* note 48, § 411.2, at 567.

131. WRIGHT & MILLER, *supra* note 13, § 2255, at 530.

132. *Id.*

133. *Id.* at 535.

134. See WIS. STAT. § 804.11(2) (1993-94).

B. *Ultimate Facts*

The use of a request for admission to establish an ultimate issue in a case has been tested three times in Wisconsin, twice on substantive issues and once on damages. In *Schmid v. Olsen*,¹³⁵ the Supreme Court of Wisconsin reviewed a case in which the trial court relieved a party from the effect of its failure to respond to a request for admission. The request asked the defendant to admit that he was seventy percent causally negligent. The defendant failed to respond to the request within thirty days, prompting the plaintiff to argue that the request was deemed admitted pursuant to section 804.11(1)(b). The trial court ruled that the subject matter of the request was improper because it involved the ultimate issue in the case.¹³⁶ The court of appeals affirmed on different grounds, ruling that even if the requests were proper, withdrawal of the admission served the presentation of the merits on a genuine issue in the case and that the plaintiff did not show any prejudice resulting from the withdrawal.¹³⁷

The majority of the supreme court held that the percentage of causal negligence, albeit the ultimate issue in the case, was a proper subject for a request for admission.¹³⁸ Citing a string of federal decisions, the Supreme Court of Wisconsin concluded:

We believe that there is no compelling reason why a request to admit seventy percent negligence should be considered a nullity. "The rule [Federal Rule 36] is designed to expedite litigation, and it permits the party securing admissions to rely on their binding effect."¹³⁹

In dissent, Justice Steinmetz, joined by Justice Beilfuss, asserted that the percentage of causal negligence is not a proper subject for a request for admission.¹⁴⁰ Justice Steinmetz declared that the percentage of negligence is not relevant to the case, nor does it tend to lead to the discovery of other relevant evidence. Permitting such requests, according to Justice Steinmetz, will complicate and increase litigation, as litigants will be inclined to use requests for admission in an effort to catch their adversaries off guard.

135. 111 Wis. 2d 228, 330 N.W.2d 547 (1983).

136. *Id.* at 230-31, 330 N.W.2d at 549.

137. *Id.* at 231, 330 N.W.2d at 549.

138. *Id.* at 235-36, 330 N.W.2d at 551.

139. *Id.* at 236-37 n.4, 330 N.W.2d at 551 n.4 (quoting *Rainbolt v. Johnson*, 669 F.2d 767, 768 (D.C. Cir. 1981)).

140. *Id.* at 240, 330 N.W.2d at 553 (Steinmetz, J., dissenting).

During the same term, the Supreme Court of Wisconsin issued a decision in *Bank of Two Rivers v. Zimmer*,¹⁴¹ in which it upheld the trial court's granting of summary judgment in favor of the plaintiff based on the defendants' failure to respond in a timely fashion to the plaintiff's requests for admission. The case consisted of a quiet title action. The plaintiff requested the defendants to admit that they had no interest of record in the disputed parcel of land, which for all practical purposes was the ultimate issue in the case. The defendants failed to respond to the request within thirty days, resulting in a deemed admission. Based on this admission, the trial court granted summary judgment in favor of the plaintiff.¹⁴² The court of appeals affirmed. The supreme court also affirmed, finding that the trial court did not abuse its discretion in deeming the unanswered request admitted. The supreme court also approved the use of summary judgment based solely upon a party's untimely or incomplete response to a request for admission.¹⁴³

The decisions in *Schmid* and *Bank of Two Rivers* confirm that requests for admission can be directed at the ultimate facts in the case. If the answering party admits the ultimate issue or fails to respond in a proper or timely fashion, the admissions may be used as a basis for summary judgment.¹⁴⁴ This is true even if the ultimate issue is one on which the requesting party has the burden of proof.¹⁴⁵

Not every disputed fact, however, is the proper subject of a request for admission. In *Kettner v. Milwaukee Mutual Insurance Co.*,¹⁴⁶ the Wisconsin Court of Appeals held that the value of a personal injury claim is not a proper subject for a request for admission. The defendant in that case requested that the plaintiff admit that "the value of the plaintiff's claim for injuries in this case, taking into account his own contributory negligence does not exceed \$100,000."¹⁴⁷ The defendant admitted that the statement was true. At trial, the jury awarded the

141. 112 Wis. 2d 624, 334 N.W.2d 230 (1983).

142. *Id.* at 626-28, 334 N.W.2d at 231-32.

143. *Id.* at 630-31, 334 N.W.2d at 233.

144. See, e.g., *Satell v. Continental Cas. Co.*, No. 89-1079, 1990 Wisc. App. LEXIS 658, at *5, 8 (Ct. App. Mar. 13, 1990) (limited precedent opinion); *Schultz v. Abrams*, No. 86-1433 (Wis. Ct. App. Jan. 22, 1987) (LEXIS, States library, Wisc file) (limited precedent opinion); *Backus v. Dunn*, No. 84-799 (Wis. Ct. App. Dec. 23, 1985) (LEXIS, States library, Wisc file) (limited precedent opinion); *Wiegel v. Sentry Indem. Co.*, Nos. 82-1076 and 82-1400 (Wis. Ct. App. Sept. 22, 1983) (LEXIS, States library, Wisc file) (limited precedent opinion).

145. *Adventures in Good Eating, Inc. v. Best Places to Eat, Inc.*, 131 F.2d 809, 812 (7th Cir. 1942).

146. 146 Wis. 2d 636, 431 N.W.2d 737 (Ct. App. 1988).

147. *Id.* at 638, 431 N.W.2d at 738 (quoting a request to admit).

plaintiff a net amount of \$158,956.¹⁴⁸ The defendant moved to limit the plaintiff's recovery to \$100,000 based upon the plaintiff's earlier admission. The trial court denied the defendant's motion.¹⁴⁹

The court of appeals affirmed, concluding that the subject matter of the admission was improper because "while certain components of a claim, such as past or future medical bills or lost wages are proper subjects for a sec. 804.11 request for admission, the claim's total value, including disability and pain and suffering, is not."¹⁵⁰ The court gave several reasons for its decision. First, section 804.11, if used to value claims, would be inconsistent with section 807.01,¹⁵¹ which provides a mechanism for making offers of settlement or judgment. Allowing a request for admission as to the value of a claim would defeat the policy that favors settlement of claims by providing a means to evade section 807.01.¹⁵² Second, it is difficult, if not impossible, according to the court of appeals, to place a precise value on a personal injury claim months or years before trial. Consequently, a request for admission seeking such information is inherently prejudicial.

The defendant in *Kettner* argued that the case was controlled by the decisions in *Schmid* and *Bank of Two Rivers*, in which the supreme court approved the use of requests for admission of ultimate issues. The *Kettner* court disagreed, stating that *Schmid* and *Bank of Two Rivers* both involved the "application of a legal concept to a set of facts, which are fixed in time and susceptible to valuation."¹⁵³ Conversely, the value of a claim, especially in a personal injury case, is inherently variable,

148. *Id.* at 639, 431 N.W.2d at 738. The jury awarded plaintiff \$227,080.05, which was reduced to \$158,956.03 because plaintiff was found contributorily negligent. *Id.*

149. *Id.* at 639-40, 431 N.W.2d at 738.

150. *Id.* at 641, 431 N.W.2d at 739.

151. WIS. STAT. § 807.01(1) (1993-94) provides:

After issue is joined but at least 20 days before the trial, the defendant may serve upon the plaintiff a written offer to allow judgment to be taken against the defendant for the sum, or property, or to the effect therein specified, with costs. If the plaintiff accepts the offer and serves notice thereof in writing, before trial and within 10 days after receipt of the offer, the plaintiff may file the offer, with proof of service of the notice of acceptance, and the clerk must thereupon enter judgment accordingly. If notice of acceptance is not given, the offer cannot be given as evidence nor mentioned on the trial. If the offer of judgment is not accepted and the plaintiff fails to recover a more favorable judgment, the plaintiff shall not recover costs but defendant shall recover costs to be computed on the demand of the complaint.

152. *Kettner*, 146 Wis. 2d at 641, 431 N.W.2d at 739. An accepted offer of settlement under § 807.01 ends the case, but an admission does not. *Id.*

153. *Id.* at 643, 431 N.W.2d at 740.

being based on a series of factors that constantly change prior to and during the trial.

C. *Pure Questions of Law*

The application of law to fact is a proper subject of a request for admission. Pure questions of law, however, are not. For example, a request by an alleged patent infringer asking the patent holder to admit that certain patent claims are invalid is an improper request for admission.¹⁵⁴ Likewise, a request for admission asking a party to admit that it owed a legal duty to others may be improper.¹⁵⁵ It would also be inappropriate to ask a party to admit that it was proper to remove a state court action to federal district court.¹⁵⁶ There is no Wisconsin authority on this point.

IV. RESPONDING TO REQUESTS FOR ADMISSION

The response to a request for admission must be in writing and must be signed by the party or the party's attorney.¹⁵⁷ Wisconsin Statutes section 802.05, the counterpart to FRCP 11, governs the signing of the response.¹⁵⁸ Generally, the response must be served on the requesting party's attorney within thirty days after service of the request.¹⁵⁹ When responding to a request for admission, the party must consider the impact of the response upon the case.¹⁶⁰

The more harmful the impact an admission may have upon a case, the more scrutiny an attorney should devote to uncovering objections or drafting good-faith qualifying answers or denials. This scrutiny must also weigh the risk that the [requesting] party may challenge the sufficiency of a response that is not an admission.¹⁶¹ Thus, a nonadmission may increase expenses and time disproportionately to its impact on a case.¹⁶²

There are several possible responses to a request for admission, including: an admission; a denial; an answer admitting part and denying

154. *Golden Valley Microwave Foods, Inc. v. Weaver Popcorn Co.*, 130 F.R.D. 92, 96 (N.D. Ind. 1990).

155. *See Currie v. United States*, 111 F.R.D. 56, 59 (M.D.N.C. 1986).

156. *Morris v. Marshall County Bd. of Educ.*, 560 F. Supp. 43, 45-46 (N.D. W. Va. 1983).

157. *Wis. STAT. § 804.11(1)(b)* (1993-94).

158. *See id.* § 802.05.

159. *Id.* § 804.11(1)(b). Copies of the response should be served on all other parties to the action. The original should be maintained by the requesting party. *Id.* § 804.01(6).

160. *HAYDOCK ET AL.*, *supra* note 44, at 437.

161. *Id.*

162. *Id.*

part; a statement that the answering party lacks sufficient information to admit or deny; an objection; a motion for a protective order; a motion for an extension of time to respond; or an untimely or insufficient response (or no response at all).

A. Admission

Section 804.11 does not expressly provide that a party may respond to a request with an admission, but the propriety of such a response is implicit in the language of the statute.¹⁶³ "The obligation to admit should exist whenever a party is convinced that a proposition is true, regardless of the factors which led to his conviction. Whether the belief is based on personal observation or information furnished by others, a proposition that is not disputed should be conceded."¹⁶⁴ An admission conclusively establishes the statement in the request, unless the court on motion permits withdrawal or amendment of the admission.¹⁶⁵ An admission made by a party can be used only in the action in which it is made and cannot be used for any other purpose.¹⁶⁶

B. Denial

A denial should specifically deny the request for admission or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial

shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify an answer or deny only a part of the matter of which an admission is requested, the party shall specify so much of it as is true and qualify or deny the remainder.¹⁶⁷

Denials should be forthright, specific, and unconditional.¹⁶⁸ If a response is thought insufficient as a denial, the court may treat it as an admission.¹⁶⁹ Prior to 1970, some courts thought that an insufficient denial should automatically be taken as an admission, but the 1970 amendments to FRCP 36 provided a procedure by which the requesting party may move to determine the sufficiency of the answer.¹⁷⁰ If the court

163. See CORRIS & LEITNER, *supra* note 29, § 5.19.

164. Finman, *supra* note 10, at 406 (footnotes omitted).

165. WIS. STAT. § 804.11(2) (1993-94).

166. *Id.*

167. *Id.* § 804.11(1)(b).

168. WRIGHT & MILLER, *supra* note 13, § 2260, at 555.

169. *Id.*

170. See WIS. STAT. § 804.11(1)(c) (1994-95).

determines that the answer is insufficient, it may either order that the matter is admitted or that an amended answer be served.¹⁷¹ The reason for this modification to FRCP 36 was:

Giving a defective answer the automatic effect of an admission may cause unfair surprise. A responding party who purported to deny or to be unable to admit or deny will for the first time at trial confront the contention that he has made a binding admission. Since it is not always easy to know whether a denial is "specific" or an explanation is "in detail," neither party can know how the court will rule at trial and whether proof must be prepared. Some courts, therefore, have entertained motions to rule on defective answers. They have at times ordered that amended answers be served, when the defects were technical, and at other times have declared that the matter was admitted.¹⁷²

In *Michael A.P. v. Solsrud*,¹⁷³ the Wisconsin Court of Appeals upheld the trial court's finding that certain answers to requests for admission were insufficient. For instance, the answering party denied all requests for admission that contained "terms of art," such as general contractor or agent, even though the court found that the nature and meaning of these phrases were clear and unambiguous. The answering party's denials, according to the court, were nothing more than "hypertechnical, semantic gymnastics."¹⁷⁴ The court concluded that the responses were made in bad faith and thus awarded fees to the requesting party.

Federal courts have also been hostile to qualified admissions and denials, often deeming such responses to be unequivocal admissions.¹⁷⁵ A denial of the accuracy of the matters stated in the request, but not of the essential truth of such matters, has been held an admission.¹⁷⁶ Likewise, a flat refusal to admit or deny has been deemed an admission, and a failure to respond to a particular part of a request has been treated as an admission of that part.¹⁷⁷ Disingenuous, hair-splitting denials are strictly prohibited.

171. *Id.* In federal court, when filing a motion to determine the sufficiency of an answer to a request for admission, Local Rule 6.02 of the United States District Court for the Eastern District of Wisconsin requires the requesting party to attach a statement to the motion that sets forth the informal attempts the parties have made to resolve the dispute. E.D. Wis. R. 6.02.

172. 1970 Note, *supra* note 23.

173. 178 Wis. 2d 137, 502 N.W.2d 918 (Ct. App. 1993), *review denied*, 179 Wis. 2d clxxxvii, 508 N.W.2d 422 (1993).

174. *Id.* at 150, 502 N.W.2d at 923.

175. CORRIS & LEITNER, *supra* note 29, § 5.21.

176. *Id.*

177. *Id.*

The fact that a party has denied a statement in some other pleading or discovery device does not constitute a denial of the same statement in a request for admission. A denial of similar facts in interrogatories,¹⁷⁸ depositions,¹⁷⁹ or in answers to complaints does not operate as a denial of requests for admission.¹⁸⁰ A denial of a request for admission is not conclusive, but merely leaves the issue open for trial.¹⁸¹

C. *Admitting Part and Denying Part*

When good faith requires, a party may qualify an answer or deny part and admit part of the request for admission.¹⁸² Section 804.11 requires that the answering party admit those portions of a request that he or she knows are true, while allowing the answering party to deny the remaining matters. Attorneys should take care when making such a qualified answer, as courts may deem the entire request admitted if there is any evidence of bad faith.

It is important that the answers be clear and precise because any ambiguity can be costly for the answering party. If the answering party decides to partially admit and partially deny a request for admission, it is inadvisable to phrase the answer: "Admitted, but deny . . ."¹⁸³ The risk of such a response is that the court will strike everything following the word "Admitted." The preferred response is: "Denied, but admit . . .". By following this form, the requesting party is less likely to seek to strike portions of the answer.¹⁸⁴

D. *Lack of Information*

An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless the party states that he or she has made a reasonable inquiry and that the information known or readily obtainable by the party is insufficient to enable the party to ad-

178. *Weiner v. Green Bay & W.R.R.*, No. 91-3078-FT, 1992 Wisc. App. LEXIS 781, at *3 (Ct. App. July 28, 1992) (limited precedent opinion). Requests for admissions and interrogatories are separate and alternative forms of discovery. The concurrent use of interrogatories does not eliminate the duty to respond to a request for admission. *Id.*

179. *Michael A.P.*, 178 Wis. 2d at 153, 502 N.W.2d at 925 (answer to requests for admission may not be amended by subsequent deposition testimony).

180. *Schmid v. Olsen*, 111 Wis. 2d 228, 235-36, 330 N.W.2d 547, 551 (1983) (defendants' denial of fact in answer to complaint cannot substitute for denial of same fact in requests for admission).

181. GRENIG & HARVEY, *supra* note 48, § 411.5, at 574-75.

182. WIS. STAT. § 804.11(1)(b) (1993-94).

183. Dombroff, *supra* note 88 at 84.

184. *Id.*

mit or deny.¹⁸⁵ If the answering party responds to a request for admission by stating that he or she lacks sufficient information to answer, the response must set forth in detail the reasons why this is so.¹⁸⁶ This requirement alerts the requesting party to any deficiencies in the request, so that they can be cured in follow-up requests. A general statement that the answering party can neither admit nor deny, unaccompanied by reasons, is an insufficient response.¹⁸⁷

The mere fact that the request concerns information possessed or known by someone other than the answering party does not, by itself, constitute an inability to admit or deny.¹⁸⁸ This principle was explained by the Advisory Committee as follows:

The revised rule [FRCP 36] requires only that the answering party make reasonable inquiry and secure such knowledge and information as are readily obtainable by him. In most instances, the investigation will be necessary either to his own case or to the preparation for rebuttal. Even when it is not, the information may be close enough at hand to be "readily obtainable." Rule 36 requires only that a party state that he has taken these steps.¹⁸⁹

Reasonable inquiry may require questioning third parties, other litigants, or other attorneys in the case.¹⁹⁰ It may also require the answering party to conduct independent research to verify the statements in the requests for admission.¹⁹¹ A party is not required to make an admission, however, if there is a reasonable ground for concluding on the basis of all admissible evidence known to the party that the requesting party may not prevail on the issue at trial.¹⁹² Care should be taken in making such a response. If the court later finds the response was insufficient, the request may be deemed admitted.

185. WIS. STAT. § 804.11(1)(b) (1993-94); *see also* Graczyk, *supra* note 127, at 520.

186. WRIGHT & MILLER, *supra* note 13, § 2261, at 556-57. Attorneys formulating answers alleging the inability to admit or deny should provide details in their response of the sources consulted, the information obtained from those sources, and the reasons why that information is insufficient to permit an outright denial or admission. CORRIS & LEITNER, *supra* note 29, § 5.22.

187. WRIGHT & MILLER, *supra* note 13, § 2261, at 557.

188. CORRIS & LEITNER, *supra* note 29, § 5.22.

189. 1970 Note, *supra* note 23.

190. Atkinson & White, *supra* note 3, at 53. *But see* Dubin v. E.F. Hutton Group, Inc., 125 F.R.D. 372, 374-75 (S.D.N.Y. 1989) (reasonable inquiry does not require answering party to interview former employee).

191. Atkinson & White, *supra* note 3, at 53.

192. *See* Shapiro, *supra* note 31, at 1088.

E. Extension of Time to Respond

If the answering party cannot in good faith formulate a response to the requests for admission within the time allowed by section 804.11, the answering party should move for an extension of time to respond. The motion should be made well in advance of the expiration of the response period.¹⁹³ The trial court has the authority to shorten or lengthen the time for response.¹⁹⁴ It is advisable to obtain court approval of any extension of time to respond, as the court may not be bound by informal agreements between counsel.¹⁹⁵

F. Objecting to Requests for Admission

Objections to requests for admission must be made in writing and served upon the requesting party within the time allowed for answering the requests.¹⁹⁶ If some of the requests are to be answered and others objected to, the answers and objections should be contained in a single document.¹⁹⁷ The answering party must set forth in detail the basis of the objection. General objections are insufficient.¹⁹⁸ Failure to make a timely objection may result in waiver of the objection. In addition, the answering of a request for admission may constitute a waiver of any objection.¹⁹⁹

Objections may be directed to the form or the substance of the request. As to the form of the request, objections are appropriate when the request contains compound or multiple facts, as section 804.11 requires that requests be "separately set forth."²⁰⁰ An objection may also

193. See generally WIS. STAT. § 801.15(2)(a) (1993-94) (discussing time period enlargement).

194. *Id.* 804.11(1)(b). Note that motions to shorten the time in which answering parties have to respond have met with resistance in the courts. See, e.g., *Depew v. Hanover Ins. Co.*, 76 F.R.D. 8, 9 (E.D. Tenn. 1976) (motion to shorten period to 15 days was denied where requesting party had ample time to serve request in a manner so as to allow the answering party 30 days to respond); *Winslow v. Romer*, 123 B.R. 74, 76 (D. Colo. 1990) (requesting party's desire to "get at truth quickly" was insufficient justification to shorten time in which answering party had to respond).

195. Compare Gilbert C. Schumm, *Illinois Supreme Court Rule 216: How to Use Requests to Admit*, 73 ILL. B.J. 338, 341 (1985) with Kenney, *supra* note 1, at 11 (an extension can be obtained by either stipulation with opposing counsel or through a motion). See also WIS. STAT. § 804.04 (1993-94) (providing for modification of discovery procedures by written stipulation).

196. GRENIG & HARVEY, *supra* note 48, § 411.4, at 571.

197. *Id.*

198. *Id.*

199. *Pleasant Hill Bank v. United States*, 60 F.R.D. 1 (W.D. Mo. 1973).

200. WIS. STAT. § 804.11(1)(b) (1993-94).

be made if the request is vague or ambiguous.²⁰¹ Requests that are argumentative in nature are also objectionable.²⁰²

Before identifying valid objections, it is worth noting that there are several objections that are insufficient. A request for admission is not objectionable simply because the requesting party already knows the fact,²⁰³ nor is it proper to base an objection on the ground that the fact is public knowledge.²⁰⁴ It is not a ground for objection that the request relates to a matter on which the requesting party has the burden of proof. It is also not a sufficient ground that the request is directed at the ultimate issue in the case,²⁰⁵ nor is it sufficient that the request seeks opinions or conclusions. The answering party may not object on the ground that he or she lacks personal knowledge of the matter so long as the information is readily available.²⁰⁶ It is also improper to object on the ground that the admissions may be accomplished more expeditiously at a pretrial hearing.²⁰⁷

All of the standard discovery privileges and objections apply to requests for admissions.²⁰⁸ An objection that the admission sought is neither admissible nor reasonably calculated to lead to admissible evidence is sufficient.²⁰⁹ If the admission sought is protected from disclosure by a privilege, the objection will be sustained.²¹⁰ The privilege against self-incrimination has caused some difficulty. The privilege is ordinarily available in civil litigation due to the fear that information elicited in a civil proceeding will be used in a criminal prosecution. Section 804.11, however, expressly provides that answers to requests for admission may not be used in any other proceeding or for any other purpose.²¹¹ Nonetheless, considering the fact that the admission could provide an incriminating link to other admissible evidence, objections based on the privilege against self-incrimination should be sustained.²¹²

201. GRENIG & HARVEY, *supra* note 48, § 411.4, at 571.

202. Griffin v. Wilhelmsen, 24 F.R.D. 431, 432, 434 (E.D. Pa. 1959).

203. GRENIG & HARVEY, *supra* note 48, § 411.4, at 571.

204. Dombroff, *supra* note 88, at 84.

205. See *supra* section III.B. A party may deny such a request, subject to section 804.12(1)(c), and set forth the reasons for such denial.

206. WRIGHT & MILLER, *supra* note 13, § 2262, at 562.

207. United States v. Watchmakers of Switz. Info. Ctr., Inc., 25 F.R.D. 346, 347 (S.D.N.Y. 1960).

208. Kenney, *supra* note 1, at 12.

209. Wis. STAT. § 804.01(2)(a) (1993-94).

210. *Id.*

211. *Id.* § 804.11(2).

212. See, WRIGHT & MILLER, *supra* note 13, at 562-63.

The work product privilege has also caused some difficulty.²¹³ According to federal authority, the work product doctrine protects only documents and other tangible things, and not answers to requests for admission, as explained:

The courts have consistently held that the work product concept furnishes no shield against discovery, by interrogatories or by deposition, of the facts that the adverse party's lawyer has learned, or the persons from whom he has learned such facts, or the existence or nonexistence of documents, even though the documents themselves may not be subject to discovery.²¹⁴

Section 804.11 sets forth a procedure for objecting to requests for admission. When an objection is made, the answering party does not have to move for a hearing on the objection. The answering party simply serves the objections on the requesting party. The burden is on the requesting party to move for an order determining the sufficiency of the objection.²¹⁵ Unless the court determines that an objection is justified, the court must order that an answer be served.²¹⁶ Recall that if the answering party submits an insufficient answer, the court can order either that the matter is admitted or that an amended answer be served. A different approach is taken with objections found to be improper. If an objection is overruled, the court may only order that an answer be served; it cannot deem the answer admitted.²¹⁷

Requests may be so voluminous that the answering party finds the task of responding unduly burdensome or expensive. According to the Advisory Committee: "[R]equests to admit may be so voluminous and so framed that the answering party finds the task of identifying what is in dispute and what is not unduly burdensome. If so, the responding party may obtain a protective order under Rule 26(c) [section

213. See generally WIS. STAT. § 804.01(2) (1993-94) (providing scope of discovery).

214. *Baise v. Alewel's, Inc.*, 99 F.R.D. 95, 96 (W.D. Mo. 1983) (quoting 8 CHARLES A. WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE & PROCEDURE* § 2033, at 194 (1970)).

215. WIS. STAT. § 804.11(1)(c) (1993-94), which provides:

The party who has requested the admissions may move to determine the sufficiency of the answers or objections. Unless the court determines that an objection is justified, it shall order that an answer be served. If the court determines that an answer does not comply with this section, it may order either that the matter is admitted or that an amended answer be served. The court may, in lieu of these orders, determine that final disposition of the request be made at a pretrial conference or at a designated time prior to trial. Section 804.12(1)(c) applies to the award of expenses incurred in relation to the motion.

216. The losing party in this hearing will ordinarily be required to pay the opponent's expenses under section 804.12(1)(c). GRENIG & HARVEY, *supra* note 48, § 411.4, at 572.

217. CORRIS & LEITNER, *supra* note 29, § 5.20.

804.11(3)(c)].²¹⁸ The answering party must file a motion with the court to obtain a protective order pursuant to section 804.01(3)(a). If the requests subject the answering party to annoyance, embarrassment, oppression, or undue burden or expense, the court has the discretion to strike the entire set of requests, reduce the number of requests, or extend the time in which the answering party has to respond.²¹⁹ A protective order would be appropriate, for example, when the answering party is served with hundreds of requests for admission, seeking redundant, cumulative, or patently immaterial information.²²⁰ For instance, a federal court entered a protective order in a case in which 1,664 requests for admission were served on the plaintiff in an employment discrimination case.²²¹

G. Failing to Respond to Requests for Admissions

Section 804.11 is self-executing. If the answering party fails to serve written answers or objections to the requests for admission within the time allowed by section 804.11 (and he or she has not obtained an extension of time or a protective order from the court), the requests are deemed admitted.²²² Section 804.11 does not require a court order for the requests to be deemed admitted.²²³ Unless the court permits the deemed answers to be withdrawn,²²⁴ the matter admitted is conclusively established for all purposes, including summary judgment and trial. Moreover, deeming the requests admitted does not violate the answering party's due process rights.²²⁵

The self-executing nature of requests for admission, coupled with the fact that requests can be directed at the ultimate facts in the litigation, makes this form of discovery very potent and very dangerous. For instance, in *Schmid v. Olsen*,²²⁶ the Supreme Court of Wisconsin noted that the answering party's failure to respond in a timely fashion to a request directed at the ultimate fact in the case was a sufficient basis for entering judgment in favor of the requesting party. The failure to re-

218. 1970 Note, *supra* note 23.

219. WIS. STAT. § 804.01(3)(a) (1993-94).

220. Kenney, *supra* note 1, at 11.

221. *Wigler v. Electronic Data Sys. Corp.*, 108 F.R.D. 204, 204 (D. Md. 1985).

222. WIS. STAT. § 804.11(1)(b) (1993-1994).

223. *American Bank of Wis. v. Dufek*, No. 90-0359, 1990 Wisc. App. LEXIS 968, at *2 (Ct. App. Oct. 23, 1990) (limited precedent opinion).

224. See *infra* Part VI.

225. *State v. Gaynor*, No. 83-283 (Wis. Ct. App. Aug. 26, 1983) (LEXIS, States library, Wisc file) (limited precedent opinion).

226. 111 Wis. 2d 228, 330 N.W.2d 547 (1983).

spond to the requests in that case defeated, for all practical purposes, any defenses the answering party otherwise had.²²⁷

Similarly, in *American Bank v. Dufek*,²²⁸ the appellate court upheld a ruling in which the trial court deemed the ultimate facts of the litigation admitted. In that case, the answering party was asked to admit that he fraudulently transferred property in an effort to conceal his assets. The answering party failed to file a timely response, and thus the requests were deemed admitted. On the basis of the deemed admissions, the court granted summary judgment in favor of the requesting party. As in *Schmid*, failure to respond to the requests for admission resulted in an adverse judgment against the answering party.²²⁹

H. *Supplementing a Response*

According to section 804.01(5), a party is under a duty to amend a prior response if he or she obtains information upon the basis of which (1) the party knows that the response was incorrect when made or (2) the party knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.²³⁰ The obligation to supplement applies to answers to requests for admission.²³¹ The requesting party is not required to specifically ask for supplementation; the duty to supplement is imposed on the answering party.²³² Moreover, the answering party may not supplement an answer to a request for admission through some other source of discovery, such as deposition testimony or answers to interrogatories.²³³

227. *Id.*

228. No. 90-0359, 1990 Wisc. App. LEXIS 968, at *1 (Ct. App. Oct. 23, 1990) (limited precedent opinion).

229. See also *Garrow Oil Corp. v. Majerus*, No. 91-2710-FT, 1992 Wisc. App. LEXIS 774 (Ct. App. July 21, 1992) (limited precedent opinion) (affirming a trial court decision granting prejudgment interest based on deemed admissions).

230. WIS. STAT. § 804.01(5)(b) (1993-94); see also FED. R. CIV. P. 26(e), which requires a party to amend or supplement a prior response to a request for admission if the party learns that for any reason the prior response is incorrect or incomplete.

231. *Michael A.P. v. Solsrud*, 178 Wis. 2d 137, 153, 502 N.W.2d 918, 924 (Ct. App. 1993), review denied, 179 Wis. 2d clxxxvii, 508 N.W.2d 422 (1993).

232. *Jenzake v. City of Brookfield*, 108 Wis. 2d 537, 540, 322 N.W.2d 516, 518-19 (Ct. App. 1982) (applying rule to interrogatories).

233. *Michael A.P.*, 178 Wis. 2d at 153, 502 N.W.2d at 924.

V. EFFECT OF AN ADMISSION

Any matter admitted under section 804.11 is conclusively established, unless the court permits withdrawal or amendment of the admission.²³⁴ The requesting party is entitled to rely on the binding effect of the admission.²³⁵ This binding effect sets requests for admission apart from all other discovery procedures and, in effect, places such admissions on par with judicial admissions.²³⁶ Once an admission is made it supersedes the pleadings.²³⁷ Answers to interrogatories, deposition testimony, and statements made in documents are merely "evidentiary" admissions; the party who made such statements is free to contradict them at trial, subject, of course, to impeachment.²³⁸

Conclusively established facts, on the other hand, are no longer issues and cannot be contradicted or impeached at trial by evidence or on summary judgment by affidavits.²³⁹ As one court put it:

An answer to a request under Rule 36 is unlike a statement of fact by a witness made in the course of oral evidence at a trial, or in oral pre-trial depositions, or even in written answers to interrogatories. It is on the contrary a studied response, made under sanctions against easy denials, to a request to assert the truth or falsity of a relevant fact pointed out by the request for admission.

[R]equests for admission, although answered under oath of a party,²⁴⁰ are normally made under the direction and supervision of counsel, who has full professional realization of their signifi-

234. WIS. STAT. § 804.11(2) (1993-94), which reads:

Any matter admitted under this section is conclusively established unless the court on motion permits withdrawal or amendment of the admission. Subject to [sec.] 802.11 governing amendment of a pretrial order, the court may permit withdrawal or amendment when the presentation of the merits of the action will be subverted thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice the party in maintaining the action or defense on the merits. Any admission made by a party under this section is for the purpose of the pending action only and is not an admission for any other purpose nor may it be used against the party in any other proceeding.

235. GREINIG & HARVEY, *supra* note 48, § 411.5, at 573.

236. *Id.*

237. JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE § 7.10, at 405 (2d ed. 1993).

238. CORRIS & LEITNER, *supra* note 29, at § 5.9; *see also* Umentum v. Kraft, No. 77-827, (Wis. Ct. App. Mar. 29, 1979) (LEXIS, States library, Wisc file) (limited precedent opinion) (stating that an evidentiary admission is subject to contradiction or explanation and does not become conclusive unless the adverse party fails to meet it with contrary evidence).

239. Schultz v. Abrams, No. 86-1433 (Wis. Ct. App. Jan. 22, 1987) (LEXIS, States library, Wisc file) (limited precedent opinion).

240. FRCP 36 no longer requires that a response be signed by the party under oath. FED. R. CIV. P. 36(a).

cance. Therefore, their similarity to sworn testimony in one respect should not reduce their effect from conclusive admissions to merely evidential ones.²⁴¹

The admissions serve to eliminate disputes of material fact,²⁴² barring all evidence inconsistent with the admissions.²⁴³

A. Use in Summary Judgment

The interplay between requests for admission and summary judgment can be devastating for the answering party. As the Supreme Court of Wisconsin has noted:

Federal courts have considered the question of the proper interplay between the summary judgment statute and the request for admission statute and have held that summary judgment based upon a party's untimely or incomplete response to a request for admission can be appropriate, since the party is deemed to have in effect admitted all material facts contained therein, even though he may have denied them in his pleadings.²⁴⁴

Summary judgment is a drastic remedy under such conditions, but the mandatory language of section 804.11(2) requires such a result.²⁴⁵ The admissions must, however, encompass all elements of a claim or defense for summary judgment to be appropriate.²⁴⁶ Deemed admissions may also support a default judgment, when appropriate.²⁴⁷ Also worth noting is that a party who obtains admissions by default does not waive his or her right to rely thereon by presenting evidence at trial that overlaps the matters contained in the deemed admission.²⁴⁸

241. *McSparran v. Hanigan*, 225 F. Supp. 628, 637 (E.D. Pa. 1963) *aff'd*, 356 F.2d 983 (3d Cir. 1966) (footnotes omitted).

242. *Id.*

243. *Shakman v. Democratic Org.*, 481 F. Supp. 1315, 1346 n.35 (N.D. Ill. 1979). This does not mean that all admissions are admissible into evidence. Objections to the admissibility of an admission may be raised at trial. *CORRIS & LEITNER, supra* note 29, § 5.9.

244. *Bank of Two Rivers v. Zimmer*, 112 Wis. 2d 624, 630-31, 334 N.W.2d 230, 233 (1983).

245. *Id.* at 631, 334 N.W.2d at 233.

246. *Grady v. Hartford Steam Boiler Insp. & Ins. Co.*, 265 Wis. 610, 617, 62 N.W.2d 399, 402-03 (1954).

247. *Barrow v. Schott*, No. 91-1340, 1993 Wis. App. LEXIS 218, at *2 (Ct. App. Mar. 2, 1993) (limited precedent opinion).

248. Richard M. Gelb, *Civil Procedure—Effect of Failure of Party to Respond to Request for Admission of Facts*, 68 MASS. L. REV. 89, 90 (1983); *see also* *Brook Village No. Assoc. v. General Elec. Co.*, 686 F.2d 66, 72 (1st Cir. 1982). *But see* *Foellmi v. Smith*, 15 Wis. 2d 274, 289-90, 112 N.W.2d 712, 719-20 (1961) (requesting party waived right to claim answers to requests were deemed admitted when requesting party failed to object to similar examination at trial).

B. Use at Trial

Immediately prior to the commencement of most jury trials, the judge will read a statement of uncontroverted facts to the jury, including, in some cases, answers to requests for admission.²⁴⁹ For the requesting party, it is helpful to have this recitation of favorable facts early in the trial, as numerous studies indicate that information which the jury hears first creates the most substantial impact.²⁵⁰ Moreover, the fact that the statement is read by the trial judge adds even more credibility and importance to the admissions. Jurors view communications from the judge with great respect and credibility.²⁵¹ The requesting party can take advantage of this respect and believability by including key admissions in the uncontroverted statement of facts.

The opening statement is also an effective place to reference an admission.²⁵² This is true for several reasons:

First, unless there has been a ruling preventing you from referring to each admission as an "admission," advising the jury in your opening statement that your adversary has "admitted" to this, that, or the other makes it appear that your adversary has conceded part of its case to you. Your opponent will have a difficult time objecting to your characterization of the admission as an "admission," because that is exactly what it is.²⁵³

The second reason to use an admission in the opening statement is that it acts as a promise to the jury that proof of some particular fact will be forthcoming.²⁵⁴ Unlike most promises at trial, this one is sure to be kept, adding credibility to the requesting party's case.

Answers to requests for admission may also be introduced at trial as substantive evidence.²⁵⁵ Ordinarily, admissions should be offered during the requesting party's case-in-chief. Before an admission can be accepted into evidence, however, it is subject to all pertinent objections that may be interposed at trial.²⁵⁶ Indeed, courts have ordered answering parties to answer requests seeking inadmissible evidence with the understanding that such answers would not be admissible at trial.²⁵⁷

249. KAPLAN, *supra* note 56, § 17.25, at 391.

250. *Id.*

251. *Id.* at 392.

252. *Id.*

253. *Id.* Any attempt to object while your opening statement is proceeding would probably result in embarrassment to your adversary. *Id.*

254. *Id.*

255. FED. R. EVID. 801(d)(2); see WIS. STAT. § 908.01(4)(b) (1993-94).

256. WRIGHT & MILLER, *supra* note 13, § 2264, at 571.

257. Winchester v. Padgett, 167 F. Supp. 444, 448 (N.D. Ga. 1952).

Admissions also make effective impeachment tools on cross-examination since they can be used in the same manner as other prior inconsistent statements.²⁵⁸ In addition, admissions can be used during closing argument to remind the jury that the requesting party was faithful to its promise regarding proof of the admission. This adds significant credibility to the requesting party's overall case.²⁵⁹

C. Use in Other Proceedings

Any admission made by a party under section 804.11 is for the purpose of the pending action only and is not an admission for any other purpose, nor may it be used against the party in any other proceeding.²⁶⁰ This rule prevents the use of admissions in other civil cases, as well as criminal or administrative proceedings.²⁶¹ It also prevents the use of a judgment based solely on an admission, as opposed to the admission itself, in a later proceeding.²⁶²

A few questions remain open, however. First, can an admission in one proceeding be used to impeach the trial testimony of the answering party in another action?²⁶³ Read literally, section 804.11(2) would seem to prevent such use, but the outcome is uncertain. Second, if the plaintiff makes an admission while the action is pending in state court and the action is later removed to federal court, can the admission be used in the later proceeding? What about cases that are consolidated, bifurcated, or dismissed subject to refiling in another jurisdiction? Can a denial, as opposed to an admission, be used in subsequent proceedings? Section 804.01(2) merely provides that "any admission" made by a party cannot be used in other proceedings; it is silent on denials.²⁶⁴ While section

258. KAPLAN, *supra* note 56, § 17.25, at 392.

259. *Id.* at 393.

260. WIS. STAT. § 804.11(2) (1993-94).

261. *See, e.g.,* Seay v. International Ass'n of Machinists, 360 F. Supp. 123, 124 (C.D. Cal. 1973); Weis-Fricker Export & Import Corp. v. Hartford Accid. & Indem. Co., 143 F. Supp. 137, 139 (D. Fla. 1956) (applying the rule to interrogatories).

262. *In re Cassidy*, 892 F.2d 637, 640 n.1 (7th Cir. 1990) [(tax court judgment based solely on admissions cannot be used to estop relitigation of a factual question in a later proceeding), *cert. denied*], 498 U.S. 812 (1990).

263. CORRIS & LEITNER, *supra* note 29, § 5.9. For example, assume that a number of different lawsuits have been filed arising out of the same alleged wrongful conduct. . . . If plaintiff A serves a request that the defendant admits, and in a separate lawsuit plaintiff B serves the identical request that the defendant denies, may plaintiff B impeach the defendant by using the defendant's response to plaintiff A's request? *Id.*

264. *See generally* DOMBROFF, *supra* note 91, at 267-69 (discussing the availability of a denial in subsequent appeals).

804.11(2)'s prohibition against use in other proceedings seems iron-clad, there are many unanswered questions.

Another question that has been raised is whether an admission of one defendant (or plaintiff) may be used against another defendant (or plaintiff) in the same action. Assume a lawsuit in which the plaintiff sues both the manufacturer and the installer of a machine. In the complaint, the plaintiff alleges that the installer negligently installed the machine and the manufacturer negligently built the machine. Plaintiff serves a request for admission on the manufacturer asking it to admit that the installation was performed in a negligent manner. The manufacturer admits the request. Can the admission be used against the installer? The answer apparently is no.²⁶⁵

VI. WITHDRAWAL OR AMENDMENT OF ADMISSIONS

"Any matter admitted under . . . [section 804.11] is conclusively established unless the court on motion permits withdrawal or amendment of the admission."²⁶⁶ The standard to be applied by the court in determining whether to allow the answering party to withdraw or amend an answer to a request for admission varies depending on the timing of the motion. Regardless of the standard applied, courts should be cautious in permitting the withdrawal or amendment of admissions.²⁶⁷ It is not necessary for a party seeking withdrawal or amendment of an admission to bring a formal motion in every case.²⁶⁸ It is within the trial court's discretion whether to permit withdrawal or amendment of the admission, regardless of whether a formal motion has been filed.²⁶⁹

If the motion is asserted before the pre-trial order is entered, the court may permit withdrawal or amendment (1) when the presentation of the merits of the action will be subserved by the withdrawal or amendment and (2) the requesting party fails to satisfy the court that withdrawal or amendment will prejudice him or her in maintaining the action or defense on the merits.²⁷⁰ The decision to allow relief from the effect of an admission is discretionary,²⁷¹ requiring the court to balance the answering party's right to a full trial on the merits against the re-

265. See generally KAPLAN, *supra* note 56, § 17.06, at 371.

266. WIS. STAT. § 804.11(2) (1993-94).

267. WRIGHT & MILLER, *supra* note 13, § 2264, at 578.

268. Schmid v. Olsen, 111 Wis. 2d 228, 235 n.3, 330 N.W.2d 547, 551 n.3 (1983).

269. Demos v. Giller, No. 87-0511, 1988 Wisc. App. LEXIS 50, at *8-9 (Ct. App. 1988) (limited precedent opinion).

270. *Id.* at *9-10.

271. Schmid, 111 Wis. 2d at 237, 330 N.W.2d at 511.

questing party's justifiable reliance on pretrial procedure.²⁷² The discretion, however, must be exercised consistent with the two-prong test set forth in section 804.11(2).

The burden of proof in this situation is split between the parties. The answering party, who filed the motion to withdraw or amend, must establish that upholding the admission would effectively eliminate any presentation of the merits of the case at trial.²⁷³ If an admission is dispositive of the case, the court is more inclined to allow withdrawal or amendment because a failure to do so would amount to a complete admission of liability thereby preventing a trial on the merits.²⁷⁴ Allowing an admission on the key factual issue in the case would practically eliminate any presentation of the merits.²⁷⁵ In *Schmid v. Olsen*,²⁷⁶ the Supreme Court of Wisconsin noted that if it allowed the admission of an ultimate fact to stand, a trial on the merits would be unnecessary. Accordingly, the court remanded the case to the trial court to determine whether withdrawal should be permitted.²⁷⁷ Federal courts, notably, have rejected a per se rule permitting withdrawal of any admission that relates to a key issue in the litigation, requiring the answering party to come forward with some additional evidence.²⁷⁸

The second prong of the test requires the requesting party to prove that he or she will be prejudiced if the court permits withdrawal or amendment of the admission.²⁷⁹ Prejudice means the difficulty a party may have in proving its case because of the sudden need to obtain evidence supporting the matter previously admitted.²⁸⁰ Prejudice stems from the requesting party's reliance on the binding effect of the admission.²⁸¹ For example, a party is prejudiced when trial is imminent and the party has, in reliance on its opponent's admissions, forgone discovery that would have explored the fact established by the admissions.²⁸² Any adverse effect on the requesting party's general preparation for trial

272. Kenney, *supra* note 1, at 14.

273. *Id.*

274. *Id.*

275. *Westmoreland v. Triumph Motorcycle Corp.*, 71 F.R.D. 192, 193 (D. Conn. 1976).

276. 111 Wis. 2d 228, 330 N.W.2d 547 (1983).

277. *Id.* at 239, 330 N.W.2d at 553.

278. *Branch Banking & Trust Co. v. Deutz-Allis Corp.*, 120 F.R.D. 655, 660 (E.D.N.C. 1988); CORRIS & LEITNER, *supra* note 29, at § 5.23.

279. WIS. STAT. § 804.11(2) (1993-94).

280. GRENIG & HARVEY, *supra* note 48, § 411.5, at 574.

281. WRIGHT & MILLER, *supra* note 13, § 2264, at 577.

282. CORRIS & LEITNER, *supra* note 29, § 5.23.

caused by the withdrawal may constitute prejudice.²⁸³ Prejudice is more likely to exist when the answering party seeks to withdraw an admission late in the trial process.²⁸⁴ The fact that the answering party's position could have been extrapolated from the pleadings and answers to interrogatories does not mitigate the prejudice. The courts have applied a somewhat liberal standard in determining the existence of prejudice.²⁸⁵

Prejudice means more than an adverse effect on the requesting party's case, as withdrawal or amendment will almost certainly prejudice the requesting party's case; otherwise, the requesting party would not contest the motion. Prejudice has been found when the withdrawal or amendment will require a delay of the trial or additional discovery.²⁸⁶ It has also been found where the withdrawal would require the requesting party to undertake a lengthy, laborious and costly search for additional evidence.²⁸⁷

There seems to be some confusion regarding the appropriate standard to apply in determining whether to allow an admission to be withdrawn or amended. As shown above, section 804.11 specifically sets forth a two-prong test for withdrawal. This test focuses on two items: the effect the admission will have on a decision on the merits and the prejudice to the requesting party if the admission is withdrawn. Nevertheless, a couple of Wisconsin decisions have utilized the "excusable neglect" standard of section 801.15 in deciding whether to permit a late answer to requests for admission.²⁸⁸ Unlike section 804.11, section 801.15 focuses on the answering party's reason for the late filing. The decisions utilizing the excusable neglect standard with respect to requests for admission would appear to be erroneous.

After the pretrial conference has taken place, the standard that the court must apply in determining whether to permit withdrawal or amendment of an admission is different. The court's authority to permit withdrawal or amendment of an admission is subject to section 802.11,²⁸⁹

283. GRENIG & HARVEY, *supra* note 48, § 411.5, at 574.

284. CORRIS & LEITNER, *supra* note 29, § 5.23.

285. Kenney, *supra* note 1, at 14.

286. E.E.O.C. v. Jordan Graphics, Inc., 135 F.R.D. 126, 129 (W.D.N.C. 1991).

287. Weva Oil Corp. v. Belco Petro. Corp., 68 F.R.D. 663, 666-67 (N.D. W. Va. 1975).

288. Wis. Stat. § 801.15(2)(a) (1993-94) provides that "[i]f a motion is made after the expiration of the specified time, it shall not be granted unless the court finds that the failure to act was the result of excusable neglect."

289. Wis. Stat. § 802.11(4) (1993-94) provides:

The judge shall make an order which recites the action taken with respect to the matters described in [section 802.11(1)] and which sets forth or confirms the final trial date. The order when entered shall control the subsequent course of action, unless modified

which governs the amendment of pretrial orders.²⁹⁰ Under section 802.11, a pretrial order or scheduling order may be amended only upon a showing of "good cause." It is unclear how the "good cause" standard differs from the two-prong test enunciated in section 804.11.²⁹¹ One commentator suggests that there is no practical difference between the two standards.²⁹² There is no Wisconsin authority on this point.

VII. EXPENSES FOR FAILURE TO ADMIT

The Court of Appeals of Wisconsin recently declared that "[i]n the face of increasingly complex and expensive litigation, discovery plays a vital role in issue formulation and limitation. As the role of discovery increases in importance, the need for effective sanctions against those who abuse the discovery process becomes greater."²⁹³ Not coincidentally, there are several sanctions associated with requests for admission. First, failure to submit a timely response results automatically in a deemed admission.²⁹⁴ Second, if the court on motion determines that a denial is insufficient, the court may deem the request admitted or order that an amended answer be served. In either event, the court may award the winning party expenses.²⁹⁵

Third, section 804.12(3) provides for cost-of-proof sanctions against a party who refuses to admit a matter that is subsequently proven true.²⁹⁶ If a party fails to admit the genuineness of any document or the truth of any matter set forth in a request for admission,²⁹⁷ and if the party requesting the admission thereafter proves the genuineness of the docu-

thereafter on motion of a party or the court for good cause. If for any reason, the action is not tried on the date set in the scheduling order or the pretrial order, the judge shall, within 30 days after the date set in the scheduling order or pretrial order, set another date for trial on the earliest available trial date.

290. *Id.* § 804.11(2).

291. Withdrawal or amendment of admissions under FRCP 36 is subject to FRCP 16, which allows amendments to the pretrial order only to prevent "manifest injustice." FED. R. Civ. P. 16(e). Federal courts are split concerning the appropriate standard to apply when determining whether to allow withdrawal of an admission after the start of trial. *Compare* *Farr Man & Co. v. M/V Rozita*, 903 F.2d 871, 876 (1st Cir. 1990) (applying manifest injustice standard) *with* *Eckell v. Borbridge*, 114 B.R. 63, 66 (E.D. Pa. 1990) (manifest injustice standard applies only if admission was incorporated in pretrial order).

292. *CORRIS & LEITNER*, *supra* note 29, § 5.23.

293. *Michael A.P. v. Solsrud*, 178 Wis. 2d 137, 156, 502 N.W.2d 918, 926 (Ct. App. 1993), *review denied*, 179 Wis. 2d clxxxvii, 508 N.W.2d 422 (Wis. 1993).

294. WIS. STAT. § 804.11(1)(b) (1993-94).

295. *Id.* § 804.11(1)(c).

296. *See generally* *CORRIS & LEITNER*, *supra* note 29, § 5.24.

297. The requesting party has the initial burden of proving that the requests were properly served on the answering party. *Michael A.P.*, 178 Wis. 2d at 148, 502 N.W.2d at 922.

ment or the truth of the matter, the requesting party may apply to the court for an order requiring the answering party to pay the requesting party the reasonable expenses, including attorney's fees, incurred in the making of that proof.²⁹⁸ Section 804.12(3) applies only in cases where the answering party denied the requests for admission or stated an inability to admit or deny. It does not apply to cases where the answering party failed to respond to a request for admission since this is deemed simply to be an admission.²⁹⁹

The award of fees under section 804.12(3) is mandatory,³⁰⁰ unless the court finds that (1) the request was held objectionable pursuant to section 804.11(1)(c); (2) the admission sought was of no substantial importance; (3) the answering party had reasonable ground to believe that he or she might prevail on the matter; or (4) there was other good reason for the failure to admit.³⁰¹ The party refuses to admit acts at its own peril, as section 804.12(3) mandates fees unless one of the four enumerated exceptions applies.³⁰²

The first exception—that the request was objectionable—is self-explanatory. If an objection was sustained, then no consequences can arise from the failure to admit.³⁰³ If an objection is unfounded, the requesting party must move the court for a determination of sufficiency prior to trial.³⁰⁴

The second exception—that the admission is of no substantial importance—is patently ambiguous, but seems to indicate that expenses will not be awarded if the time and effort to prove the matter involved in the request was trivial.³⁰⁵ Professor Finman, on the other hand, has declared that the availability of sanctions should not depend on the effort involved in proving the admission.³⁰⁶

The third exception—that the answering party had reasonable grounds to believe that he or she might prevail on the matter—is the most important of the exceptions. The question in this exception is not whether the answering party prevailed at trial, but whether the answering party reasonably believed that he or she might prevail.³⁰⁷ This ex-

298. WIS. STAT. § 804.12(3) (1993-94).

299. GRENIG & HARVEY, *supra* note 48, § 412.4, at 587.

300. *Michael A.P.*, 178 Wis. 2d at 154, 502 N.W.2d at 925.

301. WIS. STAT. § 804.12(3) (1993-94).

302. CORRIS & LEITNER, *supra* note 29, § 5.24.

303. WRIGHT & MILLER, *supra* note 13, § 2290, at 710.

304. *See* WIS. STAT. § 804.11(1)(c) (1993-94).

305. WRIGHT & MILLER, *supra* note 13, § 2290, at 710.

306. Finman, *supra* note 10, at 430.

307. WRIGHT & MILLER, *supra* note 13, § 2290, at 711-12.

ception protects the party's right to a day in court.³⁰⁸ The burden of proving this exception is easier to meet if the request for admission deals with the ultimate issue in the case.³⁰⁹

The fourth exception—other good cause for the failure to admit—is undefined and thus left to the court's discretion. Other good cause would exist, for example, if the answering party did not have, and could not obtain by reasonable inquiry, information on whether the matter contained in the request was true.³¹⁰ Other good cause would also exist if the request required the answering party go beyond a "reasonable inquiry" to determine the truth of the matter requested.³¹¹

Section 804.12(3) encourages litigants to take seriously the issue-narrowing purpose of requests for admission.³¹² If requests for admission are to be taken seriously, courts must not be reluctant to award such expenses. Section 804.12(3) specifically authorizes an award of expenses only against a party; it does not authorize an award of expenses against counsel.³¹³ The expenses that can be assessed are only those that could have been avoided by the admission and do not include expenses incurred prior to the filing of the answers to the requests for admission.³¹⁴ This includes time spent during trial to prove the matters at issue in the requests for admission, as well as time spent preparing for the trial with respect to such issues.³¹⁵ In *Mooney v. Royal Ins. Co.*,³¹⁶ the court of appeals upheld an award of \$1240 in section 804.12(3) sanctions, which represented one day of trial time and four hours of preparation time relating to matters dealt with in the requests for admission. Moreover, in *Michael A.P. v. Solsrud*,³¹⁷ the court of appeals affirmed a section 804.12(3) award of more than \$78,000 for the answering party's unrea-

308. CORRIS & LEITNER, *supra* note 29, § 5.24.

309. *Id.*

310. WRIGHT & MILLER, *supra* note 13, § 2290, at 712.

311. *See* Martin v. Mabus, 734 F. Supp. 1216, 1224 (S.D. Miss. 1990).

312. CORRIS & LEITNER, *supra* note 29, § 5.24.

313. GRENIG & HARVEY, *supra* note 48, § 412.4, at 587.

314. WRIGHT & MILLER, *supra* note 13, § 2290, at 710.

315. Michael A.P. v. Solsrud, 178 Wis. 2d 137, 154-55, 502 N.W.2d 918, 925 (Ct. App. 1993), *review denied*, 179 Wis. 2d at clxxxvii, 508 N.W.2d 422 (1993). The award may include expenses for trial preparation time, time spent listening to information revealed by other counsel that may affect those issues, listening to opening and closing statements to learn the strategy of other counsel and how that strategy may affect those issues, and attending conferences at which instructions and verdict questions that go to the heart of the jury's resolution of those issues are discussed. *Id.*

316. 164 Wis. 2d 516, 524-26, 476 N.W.2d 287, 290-91 (Ct. App. 1991).

317. 178 Wis. 2d 137, 156, 502 N.W.2d 918, 926 (Ct. App. 1993), *review denied*, 179 Wis.2d clxxxvii, 508 N.W.2d 422 (1993).

sonable denial of an entire set of requests for admission. These recent decisions indicate Wisconsin courts will not hesitate to award section 804.12(3) expenses.

VIII. REQUESTS FOR ADMISSION AND PRETRIAL CONFERENCES

Pretrial conferences are designed to require the court to exert greater control over the course of litigation, particularly the course of discovery.³¹⁸ Once the pretrial order is entered by the court, it dictates the further contours of the trial.³¹⁹ One of the purposes of the pretrial conference is to define and simplify the issues and to eliminate issues not in dispute.³²⁰ Matters that have been stipulated to and are contained in the pretrial order need not be proven at trial.³²¹ Requests for admission have the potential to facilitate the stipulation process.³²² According to one authority:

It is the *combination* of the exchange of requests addressed to issue reduction and formulation within the conference setting that yields the promise of the new approach. An exchange of requests for admission prior to the discovery conference will enable the court to know the positions of the opposing parties. If more time is needed to conduct a bona fide "reasonable inquiry," periodic discovery conferences and successive requests for admission may be used.³²³

The effectiveness of requests for admission is greatly enhanced in the pretrial conference context by use of interrogatories, which probe the basis for the denial of any request for admission.³²⁴ If used correctly, the combination of requests for admissions, interrogatories and pretrial conferences have the potential to expedite civil litigation.³²⁵

318. *Report on Practice Under Rule 36*, *supra* note 31, at 43. WIS. STAT. § 802.11(1) (1993-94) provides, in pertinent part:

In all contested civil actions . . . the judge shall . . . direct the attorneys for the parties to appear before the judge for a pretrial conference to determine whether an order should be entered on any or all of the following matters:

(a) Definition and simplification of the issues of fact and law;
(b) Necessity or desirability of amendment to the pleadings;
(c) Stipulations of fact and agreements concerning the identity of or authenticity of documents which will avoid unnecessary proof

319. DOMBROFF, *supra* note 91, at 276.

320. See WIS. STAT. § 802.11(1) (1993-94).

321. DOMBROFF, *supra* note 91, at 276.

322. *Report on Practice Under Rule 36*, *supra* note 31, at 43.

323. Evans, *supra* note 32, at 486.

324. *Report on Practice Under Rule 36*, *supra* note 31, at 44. For examples of such interrogatories, see *supra* section II.B.2.

325. *Report on Practice Under Rule 36*, *supra* note 31, at 44.

There are a few alternatives to requests for admission.³²⁶ First, the parties can stipulate to agreed facts, either as an independent agreement or as part of the pretrial order.³²⁷ Wisconsin courts have recognized that requests for admission are, in effect, stipulations of fact.³²⁸ The problem with stipulations is, of course, that there are no sanctions available to coerce recalcitrant parties to agree to facts.³²⁹ Another alternative is an agreed statement of facts, which could be part of either a trial brief or a motion for summary judgment.³³⁰ The latter procedure is described as follows:

Counsel for one side, typically the plaintiff, are ordered by the court to draft a series of numbered, narrative statements of objective facts which they believe can be established, avoiding to the extent possible all argumentative language, labels, and legal conclusions. Opposing counsel must then indicate which of the proposed facts are admitted (or will not be contested) and which are disputed, specifying the nature of the disagreement by appropriate interlineation or deletion, as well as drafting narrative statements of additional facts that they believe can be established. The newly added statements are then returned to the first party for admission (or non-contradiction) or for specific disagreement. A consolidated statement reflecting what is agreed and what remains in dispute is then filed with the court as a stipulation of the parties.³³¹

Like stipulations, agreed statements of fact lack adequate enforcement mechanisms.³³²

IX. LAWYERS BEWARE

Requests for admission expose the answering party's attorney to more discipline and malpractice liability than any other discovery device.³³³ Requests for admission have been referred to as "a ticking time

326. At least one Wisconsin court has held that a motion to dismiss is not to be used as a substitute for requests for admission. See *Boek v. Wagner*, 1 Wis. 2d 337, 343, 83 N.W.2d 916, 919 (1957).

327. WIS. STAT. § 802.11(1)(c) (1993-94).

328. *Employers Ins. v. Mitchell*, No. 82-2262, (Wis. Ct. App. June 20, 1983) (LEXIS, States library, Wisc file) (limited precedent opinion).

329. See generally *YOUNG & ZALL*, *supra* note 85, § 7.28 (observing that stipulations are useful when used early).

330. See generally TED M. WARSHAFSKY, *TRIAL HANDBOOK FOR WISCONSIN LAWYERS* § 122, at 179-82 (1981) (discussing other alternatives).

331. *MANUAL FOR COMPLEX LITIGATION*, § 21.47, at 79-80 (1985) (footnotes omitted).

332. See *Report on Practice Under Rule 36*, *supra* note 31, at 46-47.

333. See *Schumm*, *supra* note 195, at 339.

bomb which has brought grief to many a lawyer and his client because of failure to understand the statutory purpose, method and effect."³³⁴ This grief can occur at various stages in the litigation. For instance, if an attorney submits an improper denial on behalf of the answering party, his or her client may be ordered to pay the requesting party's expenses, including attorney's fees, incurred in a hearing to determine the sufficiency of the denial. The same holds true if the answering party's attorney submits an objection that is later found insufficient. Section 804.11(1)(c) permits the court to award such expenses only against the answering party, and not against his or her attorney.³³⁵ But rest assured, many clients will look to the attorney for reimbursement, assuming the attorney was at fault in drafting the improper answer or objection.

Another means of exposure is the cost-of-proof provisions in section 804.12(3). That section, like section 804.11(1)(c), permits the court to award expenses, including attorney's fees, only against the answering party, and not against his or her attorney.³³⁶ In *Michael A.P. v. Sol-srud*,³³⁷ the court ordered the answering party to pay more than \$78,000 to the requesting party. One would suspect that this award adversely affected the answering party's relationship with his attorney, possibly exposing the attorney to professional discipline and malpractice liability.

The primary means of disciplinary and malpractice exposure, however, arises when the answering party's attorney fails to respond in a timely and proper fashion to the requests for admission, resulting in the deemed admission of the requests.³³⁸ If the requests were directed at the ultimate issues in the litigation, the deemed admissions may be used as the basis for summary judgment in favor of the requesting party.³³⁹ Consequently, a late or improper response to a request for admission has the potential to end the litigation.³⁴⁰ Such a response also has the potential to expose the answering party's attorney to malpractice liability, professional discipline and court-ordered sanctions. Most attorneys seem unaware of the potential for such exposure. This may be due in part to the fact that such exposure is a relatively recent phenomenon.

334. Shirley Engel, *Requests for Admission—A Discovery Trap A Review of California Code of Civil Procedure 2033*, 18 U. WEST L.A. L. REV. 61, 61 (1986).

335. See WIS. STAT. § 804.11(1)(c) (1993-94).

336. *Id.* § 804.12(3).

337. *Michael A.P.*, 178 Wis. 2d at 156, 502 N.W.2d at 926.

338. The same exposure would exist for an attorney who improperly admits a request without his or her client's consent.

339. See, e.g., *Schmid v. Olsen*, 111 Wis. 2d 228, 236, 330 N.W.2d 547, 551 (1983).

340. *Id.*

A. Malpractice

An attorney who is unfamiliar with requests for admission may subject a client to a motion for summary judgment by unintentionally conceding all issues in the case.³⁴¹ The malpractice exposure from such conduct should be readily apparent.³⁴² For example, in *In re PCX Corp.*,³⁴³ a client asserted a malpractice action against its former attorneys, who had represented the client in a contract action. The attorneys had failed to respond to a set of requests for admission in the contract action.³⁴⁴ The client claimed that the failure to respond to the requests for admission—which resulted in all of the facts being deemed admitted for the purpose of summary judgment—was *per se* legal malpractice. The court disagreed, but noted that the “failure to respond to the Request to Admit is compelling evidence of negligence. . . .”³⁴⁵ Similarly, in *Macawber Engineering, Inc. v. Robson & Miller*,³⁴⁶ a client filed a legal malpractice action against the firm that had acted as its local defense counsel in a warranty action. The plaintiff served requests for admission on both local counsel and out-of-state counsel. Neither counsel responded. As a result, judgment was entered for the plaintiff in the amount of \$650,000.³⁴⁷ In the malpractice action, the client claimed that local counsel’s failure to respond to the requests for admission constituted legal malpractice. The Eighth Circuit disagreed. Without addressing whether the failure to respond constituted negligence, the court ruled that the attorneys, as local counsel, owed no duty to ensure the filing of discovery answers.³⁴⁸ Although the clients in these two cases lost on technicalities, it is a safe bet that many more legal malpractice actions will be asserted in the coming decades, as lawyers continue to misconceive the nature and purpose of requests for admission.

341. Schumm, *supra* note 195, at 339.

342. *Id.*

343. No. 94 C 2309, 1994 U.S. Dist. LEXIS 17778, at *1 (N.D. Ill. Dec. 8, 1994).

344. *Id.* at *2; see generally Engel, *supra* note 334, at 63-74.

345. *In re PCX Corp.*, 1994 U.S. Dist. LEXIS at *7. The court found that, under Illinois law, the failure to respond to the requests, by itself, is insufficient to establish legal malpractice. The client must show that it would have been successful in the contract action even had the requests been handled properly. *Id.*

346. No. 94-2003, 1995 U.S. App. LEXIS 1751, at *1 (8th Cir. Jan. 31, 1995).

347. *Id.*

348. *Id.* at *12.

B. Discipline

The failure of an attorney to respond in a timely fashion to requests for admission has also resulted in professional discipline. In *Porter v. State Bar*,³⁴⁹ an attorney was suspended from practice for two years for, *inter alia*, failing to respond to a series of requests for admission. The attorney's failure to respond to the requests resulted in a default judgment being entered against his client. Similarly, in *In re Riddle*,³⁵⁰ an attorney was suspended from practice for eighteen months for failing to respond to requests for admission. The attorney's malfeasance resulted in a summary judgment being entered against his client.³⁵¹ The court concluded that the lawyer had violated Arizona's version of Model Rules of Professional Conduct 1.1, 1.3 and 1.4³⁵² in his representation of the client.³⁵³ The court gave the following explanation of its decision to suspend the attorney:

The goal of lawyer discipline is not to punish the lawyer but to deter similar conduct by other lawyers. Other lawyers and the public need to know that failure to pursue a client's case and failure to inform a client of the outcome of a case will not be tolerated. The Commission believes a suspension of eighteen months will satisfy the goal of lawyer discipline.³⁵⁴

This is a hefty price to pay for what must have seemed like a trivial discovery matter. Simply put, much can be learned from Riddle's mistake.

C. Sanctions

Section 804.12(3) is not the exclusive remedy for untrue answers to requests for admission. Federal courts have held that the filing of an-

349. 801 P.2d 1135, 1136 (Cal. 1990).

350. 857 P.2d 1233, 1234 (Ariz. 1993).

351. *Id.*

352. Wisconsin's version of these rules provides:

S.C.R. 20:1.1. Competence. A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. S.C.R. 20:1.3. Diligence. A lawyer shall act with reasonable diligence and promptness in representing a client. S.C.R. 20:1.4. Communication. (a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

Wis. S. Cr. R. 20:1.1, 20:1.3, 20:1.4(a).

353. *In re Riddle*, 857 P.2d at 1235.

354. *Id.* at 1236 (citations omitted).

swers to requests for admission is governed by FRCP 11,³⁵⁵ the federal counterpart to section 802.05 of the Wisconsin Statutes.³⁵⁶ FRCP 11 provides, in pertinent part, that "[t]he signature of an attorney or party constitutes a certificate by the signer that the signer had read the pleading, motion or other paper; that to the best of the signer's knowledge, information, and belief, formed after reasonable inquiry it is well grounded in fact"³⁵⁷ Courts have determined that an answer to a request for admission is a "pleading, motion or other paper" and, as such, is included within the scope of FRCP 11.³⁵⁸ Consequently, a false answer to a request for admission would not be "well grounded in fact" if the signer knew or should have known of its falsity.³⁵⁹ According to FRCP 11:

If a pleading, motion or other paper is signed in violation of this rule, the court, upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay the other party or parties the reasonable expenses incurred because of the filing of the pleading, motion or other paper, including reasonable attorney's fees.³⁶⁰

Unlike section 804.12(3), section 802.05—Wisconsin's counterpart to FRCP 11—authorizes the court to impose sanctions on the answering party and his or her attorney.³⁶¹

355. See, e.g., *Herrera v. Scully*, 143 F.R.D. 545, 552-53 (S.D.N.Y. 1992). The 1993 amendments to FRCP 11, however, make clear that it is not to be used as a method for obtaining sanctions against a party who prepares a frivolous or bad faith response to requests for admission. According to the 1993 amendment, sanctions with respect to FRCP 36 are to be handled under the discovery sanction provisions of FRCP 37. FED. R. CIV. P. 36(a). But note that no corresponding amendments have been made to section 802.05 of the Wisconsin Statutes.

356. WIS. STAT. § 802.05(1) (1993-94), which provides in pertinent part:

The signature of an attorney or party constitutes a certificate that the attorney or party has read the pleading, motion or other paper; that to the best of the attorney's or party's knowledge, information and belief, formed after reasonable inquiry, the pleading, motion or other paper is well-grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law; and that the pleading, motion or other paper is not used for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

357. FED. R. CIV. P. 11.

358. Section 802.05(1) of the Wisconsin Statutes contains the same language as FRCP 11.

359. *A & V Fishing, Inc. v. Home Ins. Co.*, 145 F.R.D. 285, 287 (D. Mass. 1993) (quoting FED. R. CIV. P. 11).

360. FED. R. CIV. P. 11. Section 802.05(1) of the Wisconsin Statutes is substantively identical to FRCP 11.

361. See generally *A & V Fishing, Inc.*, 145 F.R.D. at 287 (comparing Rule 11 and 37 sanctions).

Attorneys may also be subject to sanctions under section 804.12(2)(b) of the Wisconsin Statutes.³⁶² If an order has been entered by the court requiring the answering party to serve an answer or to serve an amended answer and he or she refuses to do so, the court has authority to sanction the answering party and his or her attorney.³⁶³ Possible sanctions include the foreclosure of certain evidence at trial or a contempt of court finding for failure to obey a court order.³⁶⁴

X. CONCLUSION

For Wisconsin practitioners, requests for admission can be either feast or famine. On the one hand, the attorney requesting the admissions can use them to save a client considerable time and expense by eliminating or narrowing the issues involved in the dispute. Moreover, skillful use of requests for admission may result in an outright victory for the client or, at the very least, may give the client the upper-hand at trial. The attorney answering the requests for admission, on the other hand, faces virtual ruin if he or she is unfamiliar with the discovery device.³⁶⁵ An untimely or ill-prepared answer may cause final judgment to be entered against a client. It may also expose the client to pecuniary or evidentiary sanctions. This, in turn, may expose the attorney to malpractice liability, professional discipline or court-ordered sanctions.

The purpose of this Article was to provide the information necessary to guide Wisconsin attorneys through the law of admissions. While it has demonstrated the enormous potential of requests for admission, it has also warned attorneys of the hazards associated with such a potent discovery device. All things considered, however, requests for admission are a form of discovery that should be praised, not disparaged. Wisconsin attorneys are, therefore, encouraged to use requests for admission early and often in all types of civil litigation, and judges are encouraged to strictly enforce the sanctioning provisions of the rule. Proper application and enforcement of the rules will significantly reduce judicial delay and litigation expenses.³⁶⁶

362. WIS. STAT. § 804.12(2)(b) (1993-94).

363. See Kenney, *supra* note 1, at 17.

364. *Id.*

365. *Id.*

366. See generally YOUNG & ZALL, *supra* note 85, § 7.25 ("Unless the court takes an active role in promoting stipulations and the fair admission of facts, these tools are rarely useful in eliminating [other] methods of discovery.").

